Supreme Court, U.S.
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In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals, District I

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the Wisconsin trial court's refusal to address and evaluate Ronald W. Morters' reasons for relief in accordance with established case law standards and the approval of such treatment by the Wisconsin appellate courts violate Mr. Morters' Fourteenth Amendment right to due process of law and demonstrate a lack of respect and due regard for the United States and Wisconsin Constitutions?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Shannon L. Morters was also a plaintiff in the consolidated actions, but she has not participated in the appellate frivolity proceedings and the proceedings seeking relief from the fee assessment judgment because no fee assessment was made against her. The Morters' former attorney, Robert E. Sutton, did not appeal from the fee assessment against him. Because this petition involves a deprivation of Fourteenth Amendment rights by the Wisconsin courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Ronald W. Morters, prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals, District I, entered in this action on December 21, 2004 and the order of the Wisconsin Supreme Court entered on March 8, 2005 wherein the Supreme Court denied the Petition for Review of said Court of Appeals' decision.

OPINIONS BELOW

The order of the Wisconsin Supreme Court, dated March 8, 2005, denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to this Petition at D1. The decision of the Wisconsin Court of Appeals, District I, dated December 21, 2004, is unpublished and reprinted in the Appendix at A1-8.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on December 21, 2004. A timely Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on March 8, 2005 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. This petition for writ of certiorari was filed within 90 days of the date of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin Supreme Court and the decision of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provision involved in this case is Section 1 of the Fourteenth Amendment of the United States Constitution, which is set forth at App. E1. This case also involves Article I, Secs. 1 and 9, of the Wisconsin Constitution which are reproduced at App. E1-2. The state statutes involved are Wisconsin Statutes, Secs. 806.07(1)(h) and 814.025, which are set forth at App. E2-3.

STATEMENT OF THE CASE

A. Proceedings in Waukesha County

Ronald W. Morters, his wife, Ann, and their granddaughter, Shannon, were injured in a 1990 automobile accident and retained Attorney Charles H. Barr to handle their personal injury claims. Approximately two and one-half years later, Barr commenced a lawsuit in Waukesha County Circuit Court against the other driver and his insurer. (App. K3) Policy limits were determined to be $1,000,000.00. The case was scheduled for a jury trial which was to commence on August 15, 1994.

Upon the mutual request of Barr and opposing counsel, the trial was adjourned to allow mediation. Ronald did not authorize or consent to such adjournment and only learned about it after it had occurred. Barr claimed that the trial would not have occurred in any event because a jury trial which started the previous week carried over into the week of August 15th. At mediation, the insurer made a combined offer of $575,000.00 to settle all of the claims. The Morters rejected the offer and dismissed Barr. (App. K3)

The Morters hired Aiken & Scoptur, S.C. as their new attorney, and a new trial date was set for July 31, 1995. On June 29, 1995, their new law firm stipulated to canceling the trial and having the case resolved by arbitration. (App. K3) Mr. Morters disputed that he had authorized arbitration, and the Morters subsequently fired Aiken & Scoptur. (App. K3)

The Morters' new attorney moved for relief from the arbitration stipulation, but the motion was later withdrawn. At Ann's insistence, Ronald proceeded to arbitrate because of her stress and illness which ultimately resulted in her death. The arbitrator awarded a total of $557,384.17 on the three claims. (App. K3)

Barr and Aiken & Scoptur brought motions to collect their fees. The Morters challenged their entitlement to fees on the grounds that their actions breached their respective contracts for representation. Waukesha County Circuit Judge James R. Kieffer ruled that the Morters did not have just cause to discharge their former attorneys and awarded fees to both. (App. K3)

B. Milwaukee County Proceedings on the Merits

1. Commencement of Suits

Ronald and Shannon commenced separate actions[1] for professional negligence and breach of contract against Barr and his insurer, TIG, alleging that Barr had a conflict of interest in representing all three plaintiffs, Barr deprived them of a jury trial by agreeing to adjourn the trial, and Barr failed to timely sue, demand policy limits, or file

[1] Ronald's action was filed in July of 1999, and Shannon's was commenced in February of 2000.

a statutory offer to settle. Ronald's suit also included two claims with respect to the handling of insurance benefits. (App. A3, K3-4) They were represented by Attorney Robert E. Sutton. Ann died prior to the filing of these suits. These cases were consolidated for trial before the Honorable John A. Franke.

Attorney Sutton obtained expert opinions outlining Barr's negligent behavior and improper representation. The Morters also had an expert opinion valuing Ronald's case in the $750,000.00 range and the combined damages of Ronald and Ann in excess of $1,000,000.00. (App. I6)

2. The Granting of Partial Summary Judgment

Barr moved for summary judgment. On January 8, 2001, Judge Franke granted partial summary judgment. (App. N1-5) The Court granted summary judgment on the jury trial and conflict of interest claims because it believed there was no casual connection between the negligent acts and any loss by the Morters. (App. N1-3) The insurance benefits claims were dismissed since Mr. Morters had failed to respond to this portion of the motion. (App. N5) The Court refused to grant the motion with respect to the negligent handling claims because the Morters' experts might later provide an adequate evidentiary foundation for the award. (App. N4-5)

3. Trial Proceedings

The negligent handling claims went to trial in May of 2001. At the conclusion of the Morters' case on May 17, 2001, Barr moved for a directed verdict. The Court granted the motion because it believed no reasonable jury could find that Barr's alleged negligence caused damages

to the Morters. (App. Q1) In the Court's opinion, the jury could only speculate as to what would have happened if the case had been properly prepared. (App. P2)

The Court believed that no evidence was produced showing that the insurer would have paid more money had an offer been made earlier or had the demand been better packaged. (App. Q5) The insurer's counsel testified that the company would not have paid more than what was offered at mediation. (App. Q5) Previous exclusionary rulings had limited the scope of the Morters' expert testimony as to the value of the case. (App. Q8) The arbitrator's award was viewed as being the only objective evidence of the value of the case. (App. Q8) Evidence of three settlement offers which exceeded the amount offered at mediation was not presented. (App. I6-7)

On June 22, 2001, Barr filed a motion pursuant to Wisconsin Statutes, Sec. 814.025, for a frivolity finding and award of fees against the Morters. (App. I2) Due to judicial rotation, Judge Dennis P. Moroney replaced Judge Franke as the presiding judge in this case on August 1, 2001. Judgment in favor of Barr was entered by Judge Franke on July 16, 2001, but no action was taken on the frivolity motion.

C. Appellate Proceedings Regarding the Merits

On July 24, 2001, the Morters appealed from the judgment challenging, among other things, the granting of partial summary judgment and the directed verdict ruling. Because it had not been adjudicated, the frivolity motion was not part of this appeal. In an unpublished decision dated April 30, 2002, the Court affirmed the trial court's

determinations and ruled that the appeal was frivolous. (App. K1-16)

With respect to the granting of partial summary judgment on the jury trial deprivation and conflict of interest claims, the Court of Appeals agreed with the trial court. While there was evidence of negligence, there was no evidence showing that the negligent acts caused any damages to the Morters. When Barr was discharged, the Morters still had a right to a jury trial. (App. K6-7)

The Court concurred with the directed verdict ruling. The Court agreed that a jury could only speculate as to whether things would have happened differently had Barr not acted negligently. Nothing was presented by Sutton which would allow the jury to find that Barr's negligence caused damage. The arbitrator's award was believed to be the only objective evidence of the value of the case. (App. K12-14) The appellate frivolity ruling was based on deficiencies in the Morters' appellate briefs. (App. K14-16)

The Morters filed a petition for review with the Wisconsin Supreme Court. In its October 21, 2002 order, the Court vacated the portion of the decision regarding frivolity and remanded the case to the Court of Appeals for reconsideration of the frivolity matter. Ultimately, the Court of Appeals ruled that *the appeal was not frivolous but imposed sanctions for appellate rules violations*. (App. L1-9)

D. Trial Court Frivolity Proceedings

In his October 18, 2001 frivolity decision Judge Moroney found all of the claims to be frivolous. (App. R1-6) The Court concluded that Barr could not have been responsible for any perceived jury trial deprivation. (App. R4) Although the original jury trial date had been

canceled, Barr was terminated before a new date was set. (App. R4) The decision to arbitrate prevented a jury trial in any event. (App. R4)

The Court believed the conflict of interest claim had been lost because of Judge Kieffer's determination that there was no conflict. (App. R4) A reasonable attorney should have known that filing such claim again was frivolous. (App. R4) The claims as to the handling of life insurance were found to be frivolous based on the failure to respond to this portion of the motion. (App. R4)

As to the delay in filing suit claim, the Court believed no evidence was presented to establish that any filing delay caused damage to the Morters. (App. R5) When addressing the claim that Barr was negligent in failing to request full policy limits, the Court was convinced that the Morters had failed to show any damage. (App. R5) The arbitration award of $557,000.00 stood as the final value of the case. (App. R5) No matter what Barr would have requested, the Morters would only have been entitled to the value of the case as determined in arbitration. (App. R5)

The Court believed the claim for failing to prepare and present the Morters' claim to the insurer was lost from the beginning. (App. R5) According to the Court, the Morters should have known there was no damage and pursuing such claim was frivolous. (App. R5)

In its allocation of fees, the Court concluded that Mr. Morters was as culpable as Attorney Sutton in prosecuting this case. (App. S2) The Court wished that the frivolity matter had been addressed earlier and ruled that there should have been earlier notice that it was being treated as a frivolous claim. (App. S3-4) The Court assessed the sum of $20,000.00 as frivolity costs and allocated them

equally between Mr. Morters and Attorney Sutton. (App. S4)

E. Frivolity Appeal

Mr. Morters appealed from the frivolity determination. In its March 25, 2003 decision, the Court of Appeals agreed with the trial court's analysis and affirmed the frivolity determination. (App. J1-10) The Court believed that the Morters failed to allege sufficient facts to satisfy the elements of their claims and that Mr. Morters should have known the facts did not exist or could not be developed. (App. J8) The Court rejected an alternative argument that the award should have been zero or a nominal amount because of a failure to mitigate damages and provide timely notice of frivolity. (App. J8-10)

Mr. Morters filed a petition for review with the Wisconsin Supreme Court which was denied on June 12, 2003. His petition for certiorari to the United States Supreme Court, which was designated as No. 03-369, was denied in an order dated November 17, 2003.

F. Motion for Relief from Judgment

1. Trial Court Proceedings

On December 12, 2003, Ronald filed a motion pursuant to Sec. 806.07(1)(h),[2] to set aside and nullify the $10,000.00 judgment against him for frivolous costs. His motion was based upon three grounds. First, he believed that the appellate process demonstrated that his former

[2] Such statute is reproduced at App. E2. It provides for relief from a judgment for "any other reasons justifying relief from the operation of the judgment."

attorney improperly advised him to proceed with the lawsuit. (App. I3-6) Secondly, he contended that critical facts regarding the value of the case were not emphasized. (App. I6-7) Finally, Ronald cited a pending petition to the Wisconsin Supreme Court to change Wisconsin's frivolity law by adopting Rule 11 of the Federal Rules of Civil Procedure as the new frivolity law.[3] (App. I7-8) Previously, Ronald had argued that Wisconsin needs an advanced notice requirement and safe harbor provision similar to Rule 11c. (App. I7)

At the January 26, 2004 motion hearing, the trial court failed to address any of the grounds presented by Mr. Morters. (App. B1-9) Instead, the Court viewed the motion as an attempt to relitigate the whole matter. (App. B5) The Court reiterated the fact that it previously blamed both Morters and Sutton for proceeding with the case. (App. B6) The Court believed the case *was not well-reasoned perhaps from a legal standpoint and* thought there was *a greed factor from Mr. Morters' standpoint*. (App. B6) The Court felt that Ronald and Attorney Sutton made a great team together but unfortunately had the wrong concept in mind. (App. B6) Finally, the Court noted the serious consequence of bringing an action against a professional person when there is no case. (App. B6-7) The Court denied the motion and entered an order on February 11, 2004 reflecting its decision. (App. C1-2)

2. Court of Appeals Proceedings

On March 10, 2004, Mr. Morters appealed from such decision to the Wisconsin Court of Appeals. Ronald argued

[3] An excerpt from this petition is reproduced at App. M1-2.

that the trial court had failed to address his reasons for relief and analyze them in accordance with the case law standards established for the evaluation of Sec. 806.07(1)(h) motions. (App. F2-3) He alleged that the trial court's failure to conduct the requisite rational and reasoned analysis of his motion violated his constitutional right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution. (App. F3) Had the lower court conducted a proper review, it would have seen that he was entitled to relief from the frivolity assessment. (App. F3)

Because it believed Mr. Morters had failed to establish any extraordinary circumstances justifying relief, the Court determined that the trial court had properly exercised its discretion in denying the motion. (App. A7-8) The Court expressed no concern that the trial court had failed to address Morters' grounds for relief and independently analyze them using the appropriate case law standards. The Court cited the lower court's view that this motion was an attempt to relitigate previously decided issues. (App. A7) In the Court's opinion, a concern for the finality of the judgment and a belief that the fees were justly imposed were implicit in the trial court's decision. (App. A7-8) Noticeably absent from the decision is any discussion of due process.

The Court rejected Ronald's argument based upon the efforts to change Wisconsin frivolity law to provide a "safe harbor". (App. A8) Since *there had yet to be a change in the law*, the Court could not conclude that it would be in the interests of justice to vacate a judgment which was consistent with the existing law. (App. A8)

3. Supreme Court Proceedings

In his petition for review to the Wisconsin Supreme Court, Mr. Morters reiterated the trial court's failure to address his reasons for relief and evaluate them using the applicable case law standards. (App. G2-3) Since the Court of Appeals had not insisted upon adherence to such standards, Ronald urged the Court to grant review to require that the movant's grounds be specifically addressed and independently analyzed in light of the applicable case law standards. He pointed out the violation of his due process rights which occurred by virtue of the treatment of his motion. (App. G3) Mr. Morters also repeated his argument based on the pending rules change petition and the need to provide a "safe harbor".

The Wisconsin Supreme Court denied Ronald's petition in its March 8, 2005 order. (App. D1) The Supreme Court's refusal to insist that the trial court and Court of Appeals adhere to established standards for reviewing Sec. 806.07(1)(h) motions has effectively deprived Mr. Morters of due process of law. By virtue of the arguments presented in his appellate briefs and petition for review and the inaction of the State of Wisconsin's highest court, the deprivation of Ronald's constitutional rights was timely and properly raised and is now properly within the jurisdiction of this Court for review on a writ of certiorari. In an order dated March 31, 2005 and published in the May, 2005 edition of the *Wisconsin Lawyer*, the Wisconsin Supreme Court adopted the rule change petition, including the "safe harbor" provision, with certain modifications. Excerpts from this order are included in App. T1-4.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE WISCONSIN TRIAL COURT'S REFUSAL TO ADDRESS AND EVALUATE RONALD W. MORTERS' REASONS FOR RELIEF IN ACCORDANCE WITH ESTABLISHED CASE LAW STANDARDS AND THE APPROVAL OF SUCH TREATMENT BY THE WISCONSIN APPELLATE COURTS HAVE VIOLATED MR. MORTERS' FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND DEMONSTRATED A LACK OF RESPECT AND DUE REGARD FOR THE UNITED STATES AND WISCONSIN CONSTITUTIONS.

A. Introduction and General Due Process Discussion

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the States from depriving any person of life, liberty, or property without due process of law. Article I, Sec. 1, of the Wisconsin Constitution declares that Wisconsin's citizens have certain inherent rights, among those are life, liberty, and the pursuit of happiness. The Wisconsin Supreme Court has interpreted Article I, Sec. 1, as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth Amendment. See *Chicago & N.W. Ry. v. LaFollette*, 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969). Thus, Mr. Morters' due process rights are guaranteed by both Constitutions.

According to *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) and *Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934), due process of law protects against arbitrary action. *Black's Law Dictionary*, 4th Edition (1957) defines

arbitrary as "without adequate determining principle", "not done or acting according to reason or judgment", "without cause based upon law", "not governed by any fixed rules or standard", or "depending upon the will alone". All of these characterizations describe the treatment that Mr. Morters' motion for relief from judgment has received in the Wisconsin court system.

In the following discussion, Ronald will demonstrate that the decisions of the Wisconsin courts have effectively deprived him of his constitutional rights to due process by failing to adhere to the procedural process established by Wisconsin case law for the evaluation of Sec. 806.07(1)(h) motions. As the Court will see, the denial of his motion was dependent not upon the application of legal standards *but rather upon the imposition of the Court's will*. Since the Wisconsin judiciary is an arm of the State and frivolity costs are punitive in nature,[4] the requisite State action necessary to invoke the protection of the Fourteenth Amendment is certainly present.

B. Wisconsin's Procedural Process for Evaluating and Reviewing Sec. 806.07(1)(h) Motions for Relief from Judgment

Mr. Morters' motion was brought under Wisconsin Statutes, Sec. 806.07(1)(h) which allows relief from a judgment for "any other reasons justifying relief from the operation of the judgment." In *In Matter of Estate of Smith*, 82 Wis. 2d 667, 672-673, 264 N.W. 2d 239 (1978), the Supreme Court characterized Sec. 806.07(1)(h) as a catch-all provision which gives the trial court broad

[4] *Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W. 2d 586 (Ct. App. 1997) recognized the statute's punitive purpose.

discretionary authority to grant relief from a judgment. According to *Conrad v. Conrad*, 92 Wis. 2d 407, 418-419, 284 N.W. 2d 674 (1979), subsection (h) is to be liberally construed to allow relief from justice whenever appropriate to accomplish justice. Since Sec. 806.07(1)(h) was based on Rule 60 of the Federal Rules of Civil Procedure, the Wisconsin Supreme Court adopted the "accomplishment of justice" interpretation of Rule 60 set forth in *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1948) as its construction of the Wisconsin statute. *Ennis v. Ennis*, 88 Wis. 2d 82, 91, 276 N.W. 2d 341 (1979) and *Conrad*, 92 Wis. 2d at 418. Subsection (h) has also been interpreted in *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 550, 363 N.W. 2d 419 (1985) as allowing relief when extraordinary circumstances are present.

The Supreme Court set forth the following factors in *M.L.B.* to guide the trial courts in the exercise of their discretion on Sec. 806.07(1)(h) motions:

> "In exercising its discretion, the circuit court should consider factors relevant to the *competing interests of finality of judgments and relief from unjust judgments*, including the following: *whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel*; whether *relief is sought from a judgment in which there has been no judicial consideration of merits* and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief."
>
> *M.L.B.*, 122 Wis. 2d at 552. [Emphasis added]

The test on review of an order refusing to reopen a judgment is whether such refusal was an abuse of discretion. See *Conrad*, 92 Wis. 2d at 414 and *Estate of Smith*, 82 Wis. 2d at 674. In *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W. 2d 484 (1992), the Court expressed a preference for the term "erroneous exercise of discretion".

The Supreme Court in *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W. 2d 16 (1981) summarized the standard of review in the following passage:

> "A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination."

The exercise of discretion *is not* the equivalent of *unfettered decision making*, and *the record must reflect the trial court's "reasoned application of the appropriate legal standard to the relevant facts in the case." Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W. 2d 727 (1982). [Emphasis added]

An appellate court will ordinarily find an erroneous exercise of discretion "if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or [the appellate] court finds that the trial court applied the wrong legal standard." *State v. Black*, 2001 WI 31, par. 9, 242 Wis. 2d 126, 624 N.W. 2d 363 (2001) citing *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis. 2d 4, 11-12, 386

N.W. 2d 53 (1986). An erroneous exercise of discretion occurs when the trial court fails to consider and *make a record of the relevant factors, considers clearly irrelevant or improper factors*, and gives too much weight to one factor. *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 471, 588 N.W. 2d 278 (Ct. App. 1998).

As shown by the foregoing discussion, Wisconsin case law has established a comprehensive set of due process guidelines for evaluating Sec. 806.07(1)(h) motions and reviewing such determinations. Unfortunately for Mr. Morters, the Circuit Court failed to adhere to such standards, and neither the Court of Appeals nor the Supreme Court insisted on compliance. Ronald will now outline such deprivation.

C. Denial of Procedural Due Process

1. No Examination of Equitable Factors

Although Sec. 806.07(1)(h) involves an examination of equity and the interests of justice, the trial court discussed none of the equitable factors set forth in the *M.L.B.* case nor mentioned any other equitable factors. (App. B1-9) Recently, in *State v. Ronnie J.*, 2004 WI App. 58, par. 11, 271 Wis. 2d 242, 250-251, 677 N.W. 2d 684 (Ct. App. 2004), the Court of Appeals reiterated the importance of considering the *M.L.B.* factors in analyzing a Sec. 806.07(1)(h) motion *but ironically did not believe it to be important in this case*. Not one reference is made with respect to the "interests of justice", "the effective assistance of counsel", or any of the other *M.L.B.* factors. (App. B1-9) *Since it attempted to imply finality concerns on behalf of the trial court, the Court of Appeals obviously recognized the deficiencies of the decision but failed to correct them.* (App.

A7-8) Judicial expediency appears to have been of greater concern.

Instead of conducting the requisite analysis, the trial court reiterated the correctness of its earlier decision and viewed Ronald's motion as a nuisance. (App. B5-7) When it enacted Sec. 806.07, the Wisconsin legislature recognized the need for a process by which to obtain relief from judgments. The trial court's mere reaffirmance of the correctness of its earlier decision, however, has deprived Mr. Morters of the procedural process to which he is entitled under the law and exemplifies a decision founded on the will of the Court alone instead of a reasoned and rational application of the law to the facts.

Such treatment certainly violates Article I, Sec. 9, of the Wisconsin Constitution which provides that every person is entitled to a remedy in the laws for his injuries. In *Metzger v. Wisconsin Dept. of Taxation*, 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), the Wisconsin Supreme Court interpreted Article I, Sec. 9, as entitling litigants to their day in court. The trial court effectively deprived Mr. Morters of his day in court by refusing to analyze his motion in accordance with the established procedural process.

Even more troubling than the denial of due process at the trial court level is the failure by the Court of Appeals and the Supreme Court to rectify this deprivation of due process. As discussed in the *Hartung* and *Hedtcke* cases, the Wisconsin Supreme Court has required a rational and reasoned analysis of the facts and law for the proper exercise of discretion. Adherence to such standard insures that due process of law actually remains "due process" and does not degenerate into arbitrary decision making. Despite *Hedtcke's* pronouncement that the exercise of

discretion is not the equivalent of unfettered decision making[5], Wisconsin's appellate courts *promote arbitrariness and unfettered decision making* in the evaluation of Sec. 806.07(1)(h) motions by failing to correct this deprivation of due process.

2. Reliance on Irrelevant or Improper Considerations

Mr. Morters was also denied due process by virtue of the trial court's reliance on irrelevant or improper considerations, and the Court of Appeals' approval of the same. Ronald did not move to vacate the frivolity determination itself but instead sought to set aside the $10,000.00 judgment due to the improper advice and deficiencies of his former attorney as demonstrated by the appellate proceedings. (App. I3-6) He also cited the petition by members of Wisconsin legal community to change the frivolity law. (App. I7-8) The trial court, however, incorrectly viewed Ronald's motion as an attempt to re-litigate the matter, and the Court of Appeals never questioned such conclusion. (App. B5, A7)

The trial court accused Mr. Morters of being greedy. (App. B6) Because there is absolutely no evidence of greed on Mr. Morters' part, this contention is pure speculation. The record actually contains considerable evidence that Ronald's case was worth far more than the arbitration award. First, there was the letter of Attorney Dunphy which valued Ronald's case in the $750,000.00 range and the combined damages of Ronald and his wife in excess of $1,000,000.00. (App. I6) Secondly, another expert, Attorney

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[5] *Hedtcke*, 109 Wis. 2d at 471.

Tessier, testified that a reasonable attorney properly preparing the case would have a $1,000,000.00 case. (App. Q7) Finally, TIG made three separate settlement offers *which exceeded* the arbitration award. (App. I7)

Since there was evidence of greater value, it is speculative and improper to accuse him of being greedy. The Court of Appeals accepted such speculation without question. Judge Moroney also discussed the seriousness of commencing litigation against a professional person when one does not have a case and implied that the $10,000.00 judgment was necessary to safeguard Barr's professional reputation. (App. B5-7) Both the trial court and the Court of Appeals, however, did not realize that Barr's reputation is protected by the frivolity determination itself which was not challenged on reconsideration.

The trial court's concern with Barr's reputation was particularly curious since the Court of Appeals had previously acknowledged the existence of evidence showing Barr's negligent behavior. (App. K7) This preoccupation with protecting Barr may well reflect an inherent bias in the Wisconsin courts against negligence actions against attorneys.

Re-litigation, greed, and the protection of Barr's reputation were clearly irrelevant and improper factors which should not have been utilized by the trial court. Although the *Sunnyside Feed* case warned that using improper or irrelevant factors constitutes an erroneous exercise of discretion,[6] the Court of Appeals ignored such principle. Such refusal to follow this standard has further deprived Mr. Morters of due process of law.

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[6] *Sunnyside Feed*, 222 Wis. 2d at 471.

3. Failure to Consider a Relevant Matter

Mr. Morters' motion for relief was largely based upon the improper advice and deficiencies of his former attorney. (App. I3-7) As will be discussed in Section E, the appellate proceedings have shown that the responsibility for such deficient legal reasoning should lie with Ronald's former attorney. Since two of *M.L.B.*'s factors involve whether the judgment was the result of a well-informed choice and whether the party received the effective assistance of counsel, the quality of Ronald's representation was a highly relevant consideration.

In its decision, the trial court admitted that the case was not well-reasoned from the legal standpoint, but it gave no weight to this factor. (App. B6) Given its previous decisions,[7] the Court of Appeals was well aware that Morters had been victimized by bad legal advice. However, it ignored this factor in its review. According to *Sunnyside Feed*, an erroneous exercise of discretion also occurs when the court fails to consider and make a record of relevant factors. *Sunnyside Feed*, 222 Wis. 2d at 471. By ignoring a highly relevant consideration, the trial court and Court of Appeals deviated from established case law standards and denied Ronald due process.

D. The Need for Supreme Court Review

Wisconsin case law has created a system of due process for evaluating Sec. 806.07(1)(h) motions for relief from judgment and reviewing such decisions which satisfies the due process requirements of the Fourteenth Amendment and the Wisconsin Constitution. Unfortunately, in this

[7] (App. J1-10, K1-16, L1-9)

case, the trial court failed to adhere to such process, the Court of Appeals did not rectify the error, and *the Wisconsin Supreme Court deemed this due process violation not important enough to warrant its attention.* In *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), the Court recognized that it has no supervisory jurisdiction over state courts and its review of state court judgments is confined to evaluating them in relation to the Federal Constitution. An analysis of the actions of the Wisconsin courts in relation to the Due Process Clause is precisely what is involved in this case.

According to Supreme Court Rule 10(c), one consideration for granting a writ of certiorari is when a state court has decided an important question of federal law in a way that conflicts with relevant decisions of the Supreme Court. A deprivation of due process certainly presents an important question of federal constitutional law, and the actions of the Wisconsin courts herein conflict with the Supreme Court's prohibition against arbitrary action as set forth in the *Wolff* and *Nebbia* cases. The Court of Appeals' decision is particularly offensive to due process in light of the statement in the guidelines given to pro se appellants which states that "the judge or judges who consider your appeal will prepare a written opinion or order explaining the court's final decision." See Klein, Bobbie & Dulski, Laura, *Filing An Appeal, A Citizen's Guide To Filing An Appeal In The Wisconsin Court of Appeals* (June, 1991, revised January 1, 2004), p. 23. Instead of insisting upon adherence to due process standards, the Court of Appeals compounded arbitrariness by approving an erroneous exercise of discretion in a conclusory fashion.

Although the petitioner's interest in this case involves property rather than liberty, the Court should be concerned because the judgment is designed to punish Mr. Morters for his alleged civil transgression. In the *Tigerton* case, the frivolity statute's punitive purpose was recognized. *Tigerton*, 211 Wis. 2d at 785. Insuring that the right individual was punished should have been of great concern to the Wisconsin courts. When punishment is involved, the Supreme Court must insist upon strict adherence to due process standards.

The Court should also be interested in this case in view of the due process problems presented to the Court in his previous petition for certiorari which was filed in September of 2003 and designated as No. 03-369. In that petition, Mr. Morters advised the Court as to a deprivation of appellate due process because the Wisconsin Court of Appeals failed to follow the de novo standard of review for a question of law involving whether the action against Barr was frivolous. With this latest due process violation, there appears to be a pattern of indifference to due process in the Wisconsin court system which, if left unchecked, will eventually erode due process in Wisconsin. The Wisconsin courts need to be reminded by the Supreme Court of the importance of adhering to principles of due process.

As the State's highest court, the Wisconsin Supreme Court is charged with the supervision of the State's lawyers. See Wisconsin Supreme Court Rules 10.01 and 11.01. Since this case raises issues pertaining to Barr and Sutton's representation of their former client, the Wisconsin Supreme Court should have been particularly interested in reviewing this case in conjunction with its regulatory role. Given the inaction of the State's highest court, this Court should intervene to insure that the client is not

unjustly punished for his attorney's deficiencies. Finally, the fact that significant members of Wisconsin's legal community recognized problems in the current frivolity law and the Supreme Court recently changed it[8] should further interest the Court in this matter.

Recently, in an advertisement by the American Civil Liberties Union Foundation pertaining to prisoner abuse in Iraq and the confinement of individuals in Cuba, former U.S. Navy Admiral and now Dean of the Franklin Pierce Law Center, John Hutson, inquired "how can we fight to uphold the rule of law if we break the rules ourselves?" While the context is different, such concern is equally applicable in this case because it becomes more difficult to insist upon the rule of law when the courts do not follow fundamental principles of due process. Since the Wisconsin courts failed to uphold these principles, it is now necessary for the United States Supreme Court to intervene by granting certiorari in this case.

E. Grounds for Relief

1. Improper Legal Advice and Representation

a. The Jury Trial Claim

After exhausting his appellate remedies, Ronald realized that his former attorney improperly advised him to pursue this litigation. Had the trial court actually analyzed this matter on reconsideration, it would have seen that the responsibility for the pursuit of this litigation should lie solely with Attorney Sutton.

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[8] (App. M1-2, T1-4)

The best indicator of the improper advice received is the pursuit of the jury trial deprivation claim. Judge Franke granted summary judgment on this claim because he felt there was no causal connection between Barr's alleged negligent acts and any loss by the Morters. (App. N1-3) Judge Franke recognized that the Morters still had the right to a jury trial when Barr left the case. (App. N2)

The fact that Barr could not have been responsible for any jury trial deprivation because he had been previously discharged was found to be critical in the frivolity determination. (App. R4) In affirming the award of partial summary judgment, the Court of Appeals noted that " . . . the trial court correctly determined that the Morters still had the right to a jury trial when Barr was discharged . . . " (App. K7) The Court agreed with Judge Moroney's frivolity analysis in its March 25, 2003 decision. (App. J8) Despite exhaustive attempts to support the jury trial claim based on the substantial factor concept of causation, the appellate determinations showed Barr's conduct to be too remote from the injury.

At the outset, Attorney Sutton should have recognized the causation problem. The fact that the Morters still had the right to a jury trial when Barr was discharged was known by Sutton at the time of the commencement of this action. (App. I4-5) Following the dismissal of the Barr lawsuit, Sutton sued Aiken & Scoptur alleging jury trial deprivation. (App. I5) Sutton knew that the actual loss of the jury trial occurred when the Morters were represented by Aiken & Scoptur.

Sutton procured expert opinions indicating that Barr was negligent in agreeing to adjourn the trial. However, these opinions did not address how Barr's conduct ultimately caused or contributed to a jury trial deprivation

when the Morters still had the right to a jury trial upon Barr's dismissal. (App. K7) No evidence was presented to document any harm to the ability to try the case to a jury during the period of time after August 15, 1994 attributable to Barr's decision to adjourn. Sutton developed no evidence that an earlier trial date could have been obtained if the case had been "bumped" due to the scheduling conflict instead of being voluntarily adjourned.

An attorney has a duty to read and consider before litigation. See *Riley v. Isaacson*, 156 Wis. 2d 249, 259, 456 N.W. 2d 619 (Ct. App. 1990) and *Belich v. Szymaszek*, 224 Wis. 2d 419, 432, 592 N.W. 2d 254 (Ct. App. 1999). It is the *attorney's responsibility*, not the client's to know the legal elements of a negligence claim, and to analyze whether the facts of a situation can meet those requisite elements. Sutton simply failed to consider the causation issue.

b. The Negligent Handling Claims

The negligent handling claims were premised on the theory that a better prepared claim would have produced a greater settlement offer. Since summary judgment had been granted on the jury trial deprivation and conflict claims which sought damages based on what a jury would have awarded, Attorney Sutton knew that he could not rely on expert opinion regarding the amount that a reasonable jury would have awarded. Instead, testimony was needed which established that the insurer would have paid more had the claim been handled better.

The exclusionary rulings made it quite apparent that Morters' expert opinions could not establish such damage. With regard to the testimony of Attorney Tessier, the trial court prohibited any opinion as to what the insurers would have done if Barr had employed a certain demand process.

(App. O2) The Court prohibited Tessier from expressing a conclusory opinion that he simply agreed with Attorney Dunphy's evaluation. (App. O3) Tessier was later precluded from giving testimony as to the value of the case because what the insurance company would have paid was determined by the testimony of the insurer's attorney who falsely indicated that the proposal at mediation was the maximum offer. (App. K8)

When the negligent handling claims went to trial, Mr. Morters clearly had insufficient damage evidence. The absence of such evidence falls squarely upon the shoulders of Attorney Sutton. He should have developed such evidence. *Surprisingly, uncontradicted evidence favoring Ronald's case was not presented.* Attorney Terry Johnson, who represented the automobile insurance carrier, indicated that the insurer would not have offered more than what was proposed at mediation. (App. Q5) Following mediation, however, the insurer made three separate settlement offers totaling $597,500.00. (App. I6-7) Despite Morters' urging, Sutton did not present this evidence.

In his frivolity determination, Judge Moroney utilized the absence of damage evidence to find the negligent handling claims to be frivolous. (App. R4-5) Efforts to defend the negligent handling claims on appeal proved unsuccessful. The Court of Appeals concluded that there was no credible evidence which would have permitted a jury to award damages on these claims. (App. K12-14) The Court in its decision affirming the frivolity determination agreed with Judge Moroney's analysis. (App. J8) The development of sufficient and admissible damage evidence is an attorney's responsibility, and the appellate proceedings herein have demonstrated that the negligent handling claims were deficient in both respects. Responsibility

for these shortcomings should be borne solely by the attorney.

c. Appellate Briefing Deficiencies

Problems regarding the quality of Mr. Morters' legal representation are further exemplified by the briefing deficiencies in the appeal from the summary judgment and directed verdict decisions. The Court of Appeals found such appeal to be frivolous solely because of problems with the appellants' brief and violations of the Rules of Appellate Procedure. (App. K1-16) After the Morters pointed out the difference between frivolity and appellate rules violations, the Supreme Court vacated the appellate frivolity determination and remanded the matter for reconsideration. (App. I5-6) In its January 14, 2003 decision, the Court of Appeals found the appeal to be nonfrivolous but imposed sanctions for the appellate rules violations. (App. L2)

d. Summary

The foregoing discussion has shown that the pursuit of this litigation was the product of an ill-informed choice based on improper legal advice. His former attorney did not recognize the serious problems regarding causation and damages. The appellate briefing deficiencies and failure to emphasize the greater settlement offer further underscore the ineffectiveness of counsel. Two of the *M.L.B.* factors involve whether the judgment was the result of the conscientious, deliberate, and well-informed choice of the claimant and whether the claimant received the effective assistance of counsel. *M.L.B.*, 122 Wis. 2d at 550. In light of the problems with Ronald's legal advice and representation, these factors certainly warranted the

vacation of the judgment. Furthermore, since it is unjust to punish Mr. Morters for his attorney's deficiencies, the interests of justice required relief from the judgment as well.

2. The Change in Wisconsin's Frivolity Law

In his petition for review regarding the frivolity determination, Mr. Morters argued that no fees should be assessed because Barr and TIG had failed to mitigate their costs and provide timely notice with respect to frivolity. Ronald also urged the Supreme Court to adopt an advanced notice requirement and safe harbor provision similar to Rule 11c of the Federal Rules of Civil Procedure. (App. I7) The Court denied his petition on June 12, 2003.

With the July 8, 2003 filing of their joint petition[9] with the Supreme Court seeking repeal of Secs. 802.05 and 814.025 and the adoption of Rule 11 of the Federal Rules of Civil Procedure as an amended Sec. 802.05, the American Board of Trial Advocates, Wisconsin Chapter, the Civil Trial Counsel of Wisconsin, the Wisconsin Academy of Trial Lawyers, and the Litigation Section of the State Bar of Wisconsin joined Ronald's voice in calling for a change in Wisconsin law. In paragraph 2 of their petition, the petitioners presented a description of the problems with the law involving the absence of a safe harbor and delayed filing which is virtually identical to Ronald's position. (App. M1-2) As demonstrated by this litigation, the current frivolity system promotes delay and frivolity on the basis of hindsight.

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[9] (App. M1-2)

In its earlier assessment, the trial court admitted that the frivolity matter should have been raised earlier and agreed with how Rule 11 works. (App. S3-4) Surprisingly, however, the trial court did not consider this argument on reconsideration. Given the widely acknowledged problems with the frivolity law, the Court of Appeals wrongly concluded that it would not be in the interests of justice to vacate a judgment which was consistent with existing law. (App. A8) Sec. 806.07(1)(h) involves the accomplishment of justice, and it was inequitable and unjust to assess frivolity costs upon Ronald for his attorney's deficiencies by means of a tardy motion. Early notice regarding frivolity would have alerted Mr. Morters to problems with respect to his legal advice.

With its adoption of a new frivolity law which provides for a safe harbor, the Wisconsin Supreme Court finally recognized that the old system had serious problems and produced inequitable results. (App. T1-4) Although the Court was divided as to whether its rulemaking authority allowed it to make such change, Justice Roggensack in her dissent noted that a procedural safe harbor had the unanimous support of the Court. (App. T4) The petition and ultimate change to Wisconsin's frivolity law have shown the system under which this assessment was made to be an unjust process. The interests of justice cannot allow the result to stand.

CONCLUSION

By failing to rectify the errors of the trial court and Court of Appeals, the Wisconsin Supreme Court has approved a deprivation of Mr. Morters' Fourteenth Amendment rights to due process of law. It is clearly repugnant to a Constitution which guarantees due process

of law that the courts of any State can trample on those rights without a check. As the ultimate guardian of Constitutional rights, it now becomes the responsibility of the United States Supreme Court to remedy this violation and prevent blatant injustice by granting certiorari in this case. For the reasons recited in this petition, Ronald W. Morters' petition for writ of certiorari should be granted and it is respectfully requested that the Court grant the same.

Dated at Big Bend, Wisconsin, this 1st day of June, 2005.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS DECISION DATED AND FILED

December 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-0741

Cir. Ct. Nos. 99CV005303 & 00CV001705

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

SHANNON L. MORTERS,

PLAINTIFF,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Vergeront, JJ.

¶1 PER CURIAM. Ronald W. Morters, *pro se,* appeals from a trial court order denying his motion to reopen a judgment assessing frivolous costs against him in his legal malpractice suit against his former attorney, Charles H. Barr, and assessing additional attorney's fees to Barr and his insurance company for appearing for and responding to the motion. Morters contends that the judgment assessing frivolous costs against him should be "reopened, set aside, and nullified" in the interests of justice, pursuant to WIS. STAT. § 806.07(1)(h) (2001-02).[1] Because the trial court did not erroneously exercise its discretion in denying Morters request for relief, we affirm.

I. BACKGROUND.

¶2 The facts of this case have been summarized by this court before.[2] Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] As such, the factual background is provided largely by *Morters v. Barr,* No. 02-2434, unpublished slip op. ¶¶ 2-7 (WI App Mar. 25, 2003) (citing *Morters v. Barr,* No. 01-2011, unpublished slip op. ¶¶ 1-7 (WI App Jan. 14, 2003); *Morters v. Barr,* No. 01-2011, unpublished slip op. ¶¶ 2-4 (WI App Apr. 30, 2002)).

the Morters were injured, with Ronald having the most serious injuries.

¶3 The Morters and their granddaughter hired Barr as their attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the three Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict.

¶4 The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶5 Morters and his granddaughter then commenced legal malpractice suits against Barr, claiming that: (1) Barr's actions deprived them of a jury trial; (2) he had a conflict of interest in representing all three parties; and (3) he negligently handled the lawsuits in regard to those claims filed with the insurance company.[3] Morters also

[3] Ann Morters died prior to the filing of the malpractice suits.

subsequently amended his complaint to include Barr's insurer, TIG Insurance Company, as a defendant. While these actions were pending, the trial court consolidated the two Morters' lawsuits. Finding that the Morters had failed to establish any evidence that their conflict-of-interest or jury-trial claims resulted in any discernable monetary damages, the trial court dismissed those claims on partial summary judgment. With respect to the claims concerning the tortfeasor's insurance company, because the Morters failed to establish a coherent theory of damages or any compensable injury resulting from Barr's handling of the matter, the trial court dismissed this final claim at the close of the plaintiffs' case.

¶6 The Morters then appealed both the order granting partial summary judgment and the later judgment entered in the defendants' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion *in limine*; and (4) erred in directing a verdict for the respondents. We affirmed the trial court in all respects. *Morters v. Barr,* No. 01-2011, unpublished slip op. (WI App Apr. 30, 2002).

¶7 In the trial court, Barr and TIG also moved for costs and attorney's fees on the grounds that the Morters' claims against Barr were frivolous under WIS. STAT. § 814.025(3)(b). The trial court ultimately concluded that each of the Morters' claims was frivolous and ordered Ronald Morters and their attorney, Robert E. Sutton, to pay the defendants $20,000, Morters being responsible for $10,000. Morters appealed that order, and we affirmed, concluding that Morters' claims were frivolous and the amount of the judgment was reasonable. *Morters v. Barr,*

No. 02-2434, unpublished slip op. ¶¶11, 15 (WI App Mar. 25, 2003). Morters petitioned both the Wisconsin and United States Supreme Court for review, and the petitions were denied by both.

¶8 In December 2003, Morters filed a motion, pursuant to WIS. STAT. § 806.07(1)(h), to set aside and nullify the $10,000 judgment against him. In January 2004, the trial court denied the motion and awarded additional attorney's fees to Barr and TIG. Morters now appeals.

II. ANALYSIS.

¶9 Morters contends that the trial court failed to exercise its discretion in denying his motion to reopen the judgment, and that the interests of justice require that the $10,000 judgment against him be reopened, set aside, and nullified, because he now realizes that he was improperly advised to pursue litigation against Barr, and the responsibility for the frivolous action should thus lie solely with Sutton. He contends that "it is the attorney's responsibility, not the client's, to know the legal elements of a negligence claim," and "to analyze whether the facts of a situation can meet those requisite elements." He insists that Sutton "simply failed to consider the absence of causation in this case[,]" and Morters "was ill-advised to pursue this claim." He argues that Sutton failed to develop sufficient evidence and failed to emphasize the favorable evidence at trial. Morters also contends that an application of equitable factors dictates that Sutton should bear the ultimate responsibility for proceeding with the lawsuit. And finally, Morters points to a petition filed with the supreme court, which proposes a rule change in Wisconsin that would require parties to give their opponents notice

and a reasonable opportunity to respond if they intend to seek sanctions, to support his contention that it would be in the interests of justice to vacate the judgment against him. We are unpersuaded.

¶10 WISCONSIN STAT. §806.07 "authorizes the court to relieve a party from a judgment, order, or stipulation in certain circumstances. [Specifically, §]806.07(1)(h) is a catch-all provision that permits relief for 'any reasons justifying relief from the operation of the judgment.'" *Sukala v. Heritage Mut. Ins. Co.*, 2004 WI App 128, ¶8, ___ Wis. 2d ___, 685 N.W.2d 809. This section "'invokes the pure equity power of the court.'" *Id.* (citation omitted). The test for relief under WIS. STAT. §806.07(1)(h) is "whether there are 'extraordinary circumstances' to justify such relief." *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶14, 242 Wis. 2d 153, 624 N.W.2d 375 (citation omitted). "Extraordinary circumstances are those in which 'the sanctity of the final judgment is outweighed by the "incessant command of the court's conscience that justice be done in light of all the facts."'" *State v. Sprosty*, 2001 WI App 231, ¶17, 248 Wis. 2d 480, 636 N.W.2d 213 (citations omitted). Indeed:

> The court should not interpret extraordinary circumstances so broadly as to erode the concept of finality, nor should it interpret extraordinary circumstances so narrowly that subsection (h) does not provide a means for relief for truly deserving claimants. A final judgment should not be hastily disturbed, but subsection (h) should be construed to do substantial justice.

State ex rel M.L.B. v. D.G.H., 122 Wis. 2d 536, 552, 363 N.W.2d 419 (1985).

¶11 "Whether to grant relief from a judgment under WIS. STAT. § 806.07(1)(h) lies within the discretion of the trial court." *Sukala,* 2004 WI App 128, ¶7. In its exercise of discretion, "the [trial] court should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments[.]" *M.L.B.,* 122 Wis. 2d at 552; *see also Sprosty,* 248 Wis. 2d 480, ¶20. Accordingly, we will reverse the trial court only if it erroneously exercised its discretion in denying the requested relief. ***See id.***

¶12 In denying Morters' motion to set aside the judgment against him, the trial court indicated that it originally found both Morters and Sutton responsible for bringing the frivolous action, because "based on the evidence it takes two to tango." The trial court noted that while Sutton's legal reasoning was faulty, both Sutton and Morters were responsible for maintaining the frivolous action. The trial court concluded that Morters "did deserve to be punished for what [he] did in this case and the expense that [he] cost to the insurance company for having to defend the man and to [sic] his professional reputation." Furthermore, that trial court stated, "You were wrong for bringing it then and you're wrong in being back here now."

¶13 Clearly, the trial court did not find any extraordinary circumstances warranting the relief Morters requested. Despite Morters' assertion that Sutton should bear all responsibility for the frivolous costs because Morters now realizes and admits that his action against Barr was frivolous, the trial court concluded, in no uncertain terms, that both Morters and Sutton were responsible for the maintenance of the suit. It viewed Morters' current plea for relief as an attempt to relitigate issues that had already been decided and were final. Implicit in the trial court's decision was its concern for the finality of the

judgment and its conclusion that the fees were justly imposed. As Morters has failed to establish any extraordinary circumstances justifying relief, the trial court properly exercised its discretion in denying Morters request to vacate the judgment.

¶14 Moreover, in regard to Morters' claim that the fact that a petition has been filed requesting a rule change that would add a "safe harbor" provision to Wisconsin's rules regarding frivolous claims supports his contention that it would be in the interests of justice to vacate the judgment against him fails for a number of reasons. First, Morters has failed to provide us with any authority in support of the proposition that a petition for a rule change supplies the requisite extraordinary circumstances necessary for relief. Second, there has yet to be a change in the law, and we can hardly conclude that it would be in the interests of justice to vacate a judgment that was entered consistent with the law as it stands. For these reasons, we affirm.

By the Court. – Order affirmed.

This opinion will not be published. *See* WIS. STAT. Rule 809.23(1)(b)5.

APPENDIX B

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

CASE NO. 99-CV-005303

-vs-

COPY

CHARLES H. BARR, et al,

Defendants.

SHANNON MORTERS,

Plaintiff,

CASE NO. 00-CV-001705

-vs-

CHARLES H. BARR, et al,

Defendants.

MOTION HEARING

January 26, 2004

Proceedings Held Before The
HONORABLE DENNIS P. MORONEY
Circuit Court Judge
Milwaukee County, Branch 20

APPEARANCES:

RONALD MORTERS, 2755 Minot Lane, Waukesha, Wisconsin 53188, Appeared Pro Se.

WILLIAM P. CROKE, Attorney at Law, Quale, Feldbruegge, Calvelli, Thom & Croke, 710 N. Plankinton Avenue, 9th Floor, Milwaukee, Wisconsin, 53203 appeared on behalf of the Defendants.

SUSAN M. HAVENS, CPR, RPR, RMR
Official Court Reporter

[2] TRANSCRIPT OF PROCEEDINGS

THE CLERK: Ronald Morters, et al, versus Charles H. Barr, et al, 00-CV-001705.

Appearances, please.

THE COURT: There's a sister case. 99-CV-3053.

Appearances, please.

MR. MORTERS: Myself, Ronald Morters.

THE COURT: Spell the name for the record.

MR. MORTERS: M-O-R-T-E-R-S.

MR. CROKE: Attorney William Croke, C-R-O-K-E, on behalf of the defendants.

THE COURT: All right. Mr. Morters, you brought a motion before this Court?

MR. MORTERS: I did, Your Honor.

THE COURT: Use the microphone, sir. I'd appreciate that, sir, very much.

MR. MORTERS: I did.

THE COURT: State your position, please.

MR. MORTERS: That the finding of the Court previously that I need to be sanctioned for frivolous actions was incorrect and the appeals court sanctioned and reaffirmed that there was no frivolous action on my part and they blamed my [3] Attorney Sutton for all of the

actions which resulted in all the subsequent things taking place.

THE COURT: And so you're asking the Court to release you from the judgment as to those sanctions, is that what you're asking for?

MR. MORTERS: Correct.

THE COURT: Mr. Croke.

MR. CROKE: Thank you, Your Honor.

Judge, in the first place, the judgment was entered a year and-a-half ago. I don't think that this motion is timely. Mr. Morters' brief takes a position that at is timely because he appealed this all the way up to the Supreme Court of the United States and lost all the way and finally lost in the Supreme Court of the United States in November of 2003.

Of course, what Mr. Morters says is incorrect. The appellate court, did not find that your decision was incorrect; in fact, they affirmed your decision.

In that regard what they decided was that the appeal issue was Mr. Sutton's fault because he didn't write the brief appropriately and it was a briefing problem as opposed to an issue problem.

THE COURT: Correct me. Didn't we last [4] time we were here, we were directed by the Court of Appeals to have a hearing on motion on costs on the appeal.

MR. CROKE: You're correct, Your Honor.

THE COURT: And you guys, you and Mr. Morters, anyway, entered into some type of stipulation where you agreed not to assess him costs on the appeal; is that a fair statement?

MR. CROKE: You are correct, Your Honor. You're saying that correctly. Because it wouldn't have been right. He was not involved in the appeal issue. Mr. Sutton was. And I wrote a letter pursuant to what our agreement was. I think we actually prepared a stipulation.

THE COURT: I got that. It's just I've got a lot of cases.

MR. CROKE: Yeah, I know you do, Judge. So that takes care of that issue.

In terms of what Mr. Morters is really saying is I want another kick at the cat, I want to go back a year and-a-half ago, actually before a year and-a-half ago, I want to go back to the argument that was made originally on my original motion, I want to revisit that. And of course, he had an opportunity to appeal that and did and lost.

[5] So now he's just trying to either raise again the same issues or raise issues that he could have raised the first time around. And so his motion is not timely, it's been decided, and it's not appropriate.

So we ask – Quite frankly, Judge, as you see, we're here constantly. I think this motion is actually frivolous. I'm not asking for, frivolous claims costs. I just want to be done.

And I would ask you to dismiss this – or deny his motion with costs.

THE COURT: Anything further on your part, Mr. Morters?

MR. MORTERS: Yes, Your Honor.

Mr. Croke keeps on saying that I appealed to the Supreme Court and to the United States Supreme Court and I lost. There was no decision handed down by any of those courts. They refused to hear or to consider, they just dismissed it.

THE COURT: Yeah. But that's a decision. Understand. They take cases, they accept cases and what happens – or don't accept cases, many times. And what happens is when they decide not to accept a case, effectively, what they're doing is they're saying whatever the Court below [6] them decided, that's the law of the case. And that is in effect a decision, okay?

Let's – I do agree that this is an attempt to try to relitigate this whole thing. You know, I really don't have any intention of doing that because I think we litigated it more than enough.

I think that one of the problems you had here – and this is true, I said this before – you know, you had a very serious allegation here against an attorney at law, an officer of the court, that you better be able to prove up your case when you said you had these things and he failed to exercise those degree of professional responsibilities which you made allegations about. And you didn't do that.

More importantly, you didn't do that after this – after – I was only on the case – I was only in this assignment for five days when I first saw this case, I might tell you, where I was reviewing whether or not what were we doing on

this case. And I looked at it very simply from a duty, breach, cause, damage concept initially. And there were never any damages in this case available because of the arbitration which you had accepted.

MR. MORTERS: Yes, Your Honor.

[7] THE COURT: And so this thing just kept going and going and going and going, which I felt was inappropriate under the circumstances because it didn't meet the basic tests involved with what is an appropriate situation.

Now, I blamed both you and Sutton for that, and I did that when I apportioned the damages between you. And I think that in your case, you had a – I mean, there's certainly – I don't think it was well reasoned, perhaps, from a legal standpoint, but I also think there was a greed factor in it from your standpoint. And the issue was should you be responsible, or should he be responsible.

And I thought based on the evidence it takes two to tango. And I thought you and he made a great team together. Unfortunately, you had the wrong concept in mind. And you had a very serious consequence that could have been obtained against the person with some kind of professional credentials. You can't take that so willy-nilly; I mean, either you have a case or you don't. If you have a case, I don't care who it's against, I'll try it and I'll do whatever I have to. But by gosh, if you don't, you shouldn't be bringing them. And that's – that's one of the sanctions. When I used [8] the word "sanctions" I meant that. That's what the law provides for.

And so you did deserve to be punished for what you did in this case and the expense that you cost to the

insurance company for having to defend the man and to his professional reputation. That means something, Mr. Morters, whether you want to think so or not. And I'm not going to let you out of this judgment. You were wrong in bringing it then and you're wrong in being back here now.

And I'll allow costs on the motion.

Submit your affidavit, Mr. Croke.

MR. MORTERS: Your Honor, may I make a comment, Your Honor?

Mr. Croke has made allegations that we had no proof for damages whatsoever.

Could you answer one question?

THE COURT: No, Stop once.

I made the determination that there was no damages. Mr. Croke didn't. I said there wasn't. The matter of law when you have an arbitration on the transaction, occurrence, or event in this matter, and that particular arbitration was not in any way challenged by you in terms of it being contrary to law, arbitrary, capricious or the [9] like, and you signed that check and you get that 600,000-plus dollars, the case was over. That's the law. That was the predicate case. That set the value of this case. There was no other value. Why? Because the matter had been decided. And that's what this –

MR. MORTERS: Your Honor –

THE COURT: That's what this room is about. Finality. But also your contract with your insurer said the same thing about the arbitration. That's why I ruled there

was no damages to be brought against this man and that's – and I've been affirmed on that. That's it. It's over.

MR. MORTERS: Your Honor, I would just ask you to answer one question.

THE COURT: I cannot give you legal advice nor –

MR. MORTERS: No. I have one thing –

THE COURT: My reasoning has already been placed on the record.

MR. MORTERS: I don't want you to give me legal advice. I just want you to take note of something that occurred during the trial that Mr. Croke defending Mr. Barr had obtained the witness called Mr. Johnson. Mr. Johnson gave [10] perjured testimony. He gave perjured testimony as to –

THE COURT: Stop once.

MR. MORTERS: – whether –

THE COURT: Stop. Stop for a second.

If that was the case – and remember I did not do the trial, Judge Franke did. And you had a right to appeal that issue or to seek redress regarding that. To throw this out at this juncture, I'm not even going to consider it as part of this motion because it's inappropriate, it's not properly been noticed and it is not subject to this case.

This case is over, sir. The matter will be –

Get your affidavit and order to me, please.

MR. CROKE: I will, Your Honor. Thank you.

(Proceedings concluded.)

* * *

[11] STATE OF WISCONSIN)
) SS:
MILWAUKEE COUNTY)

I, SUSAN M. HAVENS, CPR, RPR, RMR, an official court reporter in and for the Circuit Court of Milwaukee County, do hereby certify that the foregoing is a true and correct transcript of all the proceedings had and testimony taken in the above-entitled matter as the same are contained in my original machine shorthand notes on the said trial or proceeding.

Dated at Milwaukee, Wisconsin, this 4th day of February, 2004.

/s/ Susan M. Havens
SUSAN M. HAVENS, CPR, RPR, RMR
Official Court Reporter

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

Case No. 99-CV-005303
Case Code: 30703

v.

CHARLES H. BARR,

Defendant.

SHANNON L. MORTERS,

Plaintiff,

Case No. 00-CV-001705
Case Code: 30703

v.

CHARLES H. BARR, et al,
TIG INSURANCE COMPANY

Defendants.

ORDER

(Filed Feb. 11, 2004)

The motion of the plaintiff, Ronald W. Morters, to reopen the judgment entered on July 29, 2002 assessing frivolous claims costs against the plaintiff, Ronald W. Morters, having come on for hearing on the 26th day of January, 2004, and the plaintiff, Ronald W. Morters, having appeared in person and the defendants, Charles H. Barr and TIG Insurance Company, having appeared by Quale, Feldbruegge, Calvelli, Thom & Croke, S.C., by William P. Croke, and the Court having heard oral argument and having considered the brief submitted by the plaintiff, Robert W. Morters,

NOW, THEREFORE, IT IS ORDERED:

1. The motion is denied.

2. The defendants shall have actual attorneys' fees for appearing for and responding to said motion in the amount of Two Hundred Nine and 00/100 ($209.00) Dollars based upon the Affidavit of William P. Croke which is attached hereto.

Dated at Milwaukee, Wisconsin, this 11th day of February, 2004.

BY THE COURT:

[SEAL]

/s/ Dennis P. Moroney
Honorable Dennis P. Moroney
Circuit Court Judge

APPENDIX D

[SEAL] OFFICE OF THE CLERK

Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

To: March 8, 2005

Hon. Dennis P. Moroney
Milwaukee County
Circuit Court
901 N. Ninth Street
Milwaukee, WI 53233

William P. Croke
Quale Feldbruegge Calvelli
Thom & Croke
710 N. Plankinton Ave. 9th Fl.
Milwaukee, WI 53203

John Barrett
Milwaukee County
Clerk of Courts
Appeals Processing Division
901 N. Ninth Street, Room G-8
Milwaukee, WI 53233

Ronald W. Morters
2755 Minot Lane
Waukesha, WI 53188

You are hereby notified that the Court has entered the following order:

No. 04-0741 ***Morters v. Barr*** L.C. #s 99CV5303, 00CV1705

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Ronald W. Morters, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX E

United States Constitution

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Wisconsin

Article 1

§ 1. Equality; inherent rights

Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

§ 9. Remedy for wrongs

Section 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to

purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Wisconsin Statutes

806.07 Relief from judgment or order.

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

814.025 Costs upon frivolous claims and counterclaims.

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

(4) To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

(Note: Statute repealed effective July 1, 2005)

APPENDIX F

COURT OF APPEALS OF WISCONSIN
DISTRICT 1
Appeal No. 04-0741

RONALD W. MORTERS,

Plaintiff-Appellant,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants-Respondents.

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

APPELLANT'S BRIEF

Court appealed from: Circuit Court for Milwaukee County

Presiding Judge: Hon. Dennis P. Moroney, Circuit Judge

Ronald W. Morters
Appellant, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

When Mr. Morters attempted to raise this inconsistency with the Court on reconsideration, Judge Moroney refused to hear his argument, (R. 181-9 & 10; A. App. 109 & 110) Potential fraud upon the Court should be of the utmost concern to the judiciary at any stage of the proceedings. Supreme Court Rule 60.04(3)(b), in fact, requires a judge who receives information that a lawyer has violated the rules of professional conduct to take appropriate action.

6. No Examination of Equitable Factors

Although Sec. 806.07(1)(h) ultimately involves an examination equity and the interests of justice, a review of the trial court's decision reveals that it discussed none of the equitable factors set forth in the *M.L.B.* case nor mentioned any other equitable factors. (R. 181-1 through 11; A. App. 101-111) Recently, in *Shanee Y. v. Ronnie J.*, 2004 WI App 58, par 11, ___ Wis. 2d ___, 677 N.W. 2d 648 (Ct. App. 2004), the Court of Appeals reiterated the importance of considering the *M.L.B.* factors in analyzing a Sec. 806.07(1)(h) motion. Not one reference is made with respect to the "interests of justice" or "the accomplishment of justice." (R. 181-1 through 11; A. App. 101-111) Instead, the trial court reiterated the correctness of its earlier decision and viewed Ronald's motion as a nuisance. (R. 181-6 through 9; A. App. 106-109) Such treatment certainly violates Article I, Sec. 9 of the Wisconsin Constitution which provides that every person is entitled to a remedy in the laws for his injuries. In *Metzger v. Wisconsin Dept. of Taxation,* 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), the Wisconsin Supreme Court noted that the right/remedy provision did not entitle litigants to the exact

remedy they desire but merely to their day in court. The trial court effectively deprived Mr. Morters of his day in court.

Since they do not intentionally render erroneous decisions, Judge Moroney and all other trial judges believe their original adjudications are correct. By enacting Sec. 806.07, however, the Legislature recognized that certain situations warrant discretionary relief from judgments and orders. On reconsideration, the trial court must do more than stand on the correctness of its earlier decision. As discussed in the *Hartung* and *Hedtcke* cases, the Supreme Court has required a rational and reasoned analysis of the facts and law for the proper exercise of discretion.

Due process considerations also require such a reasoned analysis. The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the deprivation of life, liberty, or property without due process of law. Article I, Section 1 of the Wisconsin Constitution has been interpreted as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth Amendment. See *Chicago & N.W.Ry. v. La Follette,* 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969) According to *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed 2d 935 (1974) and *Nebbia v. People of New York,* 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934) due process of law protects against arbitrary action. The exercise of discretion in this case without proper consideration of the facts and a reasoned analysis is patently arbitrary and violative of Ronald's constitutional rights. The Court should not allow it to stand.

C. Improper Legal Advice, Strategy, and Representation

1. Introductory Comments

Because he was originally led to believe that his jury trial deprivation claim and the other claims against Barr had a reasonable basis under Wisconsin law, Mr. Morters exhausted his appellate remedies in an attempt to overturn the frivolity finding. However, in light of the denial of certiorari by the United States Supreme Court[4], Ronald has now realized that his former attorney improperly advised him to pursue litigation against Attorney Barr. Had the trial court actually analyzed this matter on reconsideration, it would have seen that the responsibility for the pursuit of the Barr litigation should lie solely with Attorney Sutton.

2. The Jury Trial Deprivation Claim

* * *

[4] (R. 178-70; A. App.169)

APPENDIX G

SUPREME COURT OF WISCONSIN
Appeal No. 04-0741

RONALD W. MORTERS,

Plaintiff-Appellant-Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendant-Respondent-Respondent.

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendant.

PETITION FOR REVIEW

Court appealed from: Wisconsin Court of Appeals, District I, Hon. Ted E. Wedemeyer, Jr., Patricia S. Curley & Margaret J. Vergeront, Appellate Judges

Ronald W. Morters
Petitioner, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

verdict motion that there was no evidence that the insurer would have paid more. (R. 111-68 & 69; P. App. NR)

When Mr. Morters attempted to raise this inconsistency on reconsideration, Judge Moroney refused to hear his argument. (R. 181-9 & 10; P. App. 119 & 120) Potential fraud upon the Court should be of the utmost concern to the judiciary at any stage of the proceedings.

6. No Examination of Equitable Factors

Although Sec. 806.07(1)(h) involves an examination of equity and the interests of justice, the trial court discussed none of the equitable factors set forth in the *M.L.B.* case nor mentioned any other equitable factors. (R. 181-1 through 11; P. App. 111-121) Recently, in *State v. Ronnie J.*, 2004 WI App 58, par 11, 271. Wis. 2d 242, 250-251, 677 N.W. 2d 684 (Ct. App. 2004), the Court of Appeals reiterated the importance of considering the *M.L.B.* factors in analyzing a Sec. 806.07(1)(h) motion. Not one reference is made with respect to the "interests of justice". (R. 181-1 through 11; P. App. 111-121) There is no weighing of any factors. Instead, the trial court reiterated the correctness of its earlier decision and viewed Ronald's motion as a nuisance. (R. 181-6 through 9; P. App. 116-119)

Such treatment violates Article I, Sec. 9 of the Wisconsin Constitution, i.e. the right/remedy provision, which has been interpreted in *Metzger v. Wisconsin Dept. of Taxation,* 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), as entitling litigants to their day in court. The lower courts effectively deprived Ronald of his day in court. If Sec. 806.07(1)(h) is to have any vitality, the trial courts must be required to do more than stand on the perceived correctness

of their earlier decisions. As discussed in *Hartung* and *Hedtcke, the Supreme Court has required a rational and reasoned analysis of the facts and law for the proper exercise of discretion.* The Court of Appeals should have insisted upon adherence to these pronouncements.

Due process considerations also require such a reasoned analysis. The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the deprivation of life, liberty, or property without due process of law. According to *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed 2d 935 (1974) and *Nebbia v. People of New York,* 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934) due process of law protects against arbitrary action. The exercise of discretion in this case without proper consideration of the facts and a reasoned analysis is patently arbitrary and violative of Ronald's constitutional rights.

7. Summary

Supreme Court involvement is clearly needed when the Court of Appeals approves a reconsideration decision which does not address the movant's grounds, fails to consider and weigh relevant factors, and rests solely on the perceived correctness of the original decision. By granting this petition, the Supreme Court can establish the aforementioned guidelines which will insure that Sec. 806.07(1)(h) motions are treated fairly and properly.

* * *

APPENDIX H

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

-vs- CASE NO. –99-CV-005303

CHARLES H. BARR and TIG INSURANCE COMPANY, CASE CODE NO. - 30703

Defendants.

SHANNON L. MORTERS,

Plaintiff,

-vs- CASE NO. –00-CV-001705

CHARLES H. BARR and TIG INSURANCE COMPANY, CASE CODE NO. - 307C3

Defendants.

JUDGMENT IN FAVOR OF DEFENDANTS, CHARLES H. BARR AND TIG INSURANCE COMPANY and AGAINST RONALD W. MORTERS

(Filed Jul. 29, 2002)

Pursuant to the Order for Judgment on file granting the motion of the defendants, Charles H. Barr and TIG Insurance Company, for frivolous claims costs ~~pursuant to Sec. 814.025, Wis. Stats.~~ [not per signed order]; and the court having issued a written order that judgment be entered in favor of these defendants and against the plaintiff, Ronald W. Morters, in the sum of Ten Thousand and 00/100 ($10,000.00) Dollars,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that Attorney Charles H. Barr and his professional liability insurer, TIG Insurance Company, shall have judgment against the plaintiff, Ronald W. Morters, in the amount of Ten Thousand and 00/100 ($10,000.00) Dollars.

Judgment entered and docketed
JUL 29 2002

[handwritten note]

BY THE COURT
JOHN BARRETT
CLERK OF
CIRCUIT COURT

BY /s/ Diane Gawronski
JUDGMENT CLERK

APPENDIX I

STATE OF WISCONSIN :	CIRCUIT COURT	:	MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No.: 99-CV-005303
Case Code: 30703

SHANNON MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No.: 00-CV-001705
Case Code: 30703

BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT AND ALTERNATIVE MOTION FOR STAY

The Plaintiff, Ronald W. Morters, submits this Brief in support of his motion to set aside and nullify the July 29, 2002 judgment against him and his alternative motion to stay collection on said judgment.

A. Outline of Relevant Facts

This litigation involved actions for professional negligence and breach of contract by Ronald and Shannon Morters against their former attorney, Charles H. Barr, and his insurer, TIG Insurance Company. Such claims arose out of Barr's handling of their personal injury case in Waukesha County Circuit Court. Their complaints raised claims of jury trial deprivation, conflict of interest, and negligent handling[1] against Barr. Attorney Robert E. Sutton represented the Morters in these cases.

At a hearing held on January 8, 2001, the Court granted summary judgment dismissing the jury trial deprivation and conflict of interest claims. On May 17, 2001, the Court granted a motion for directed verdict dismissing the negligent handling claims. The Honorable John A. Franke presided over the pretrial and trial stages of these cases. Due to judicial rotation, Judge Dennis P. Moroney replaced Judge Franke as the presiding judge in this case on August 1, 2001.

On June 22, 2001, Barr and TIG filed a motion for a finding of frivolity and assessment of attorneys fees and costs against the Morters pursuant to Wisconsin Statutes, Sec. 814.025. In a decision entered on October 18, 2001, Judge Moroney ruled that all of the Morters' claims were frivolous. (Ex. B) At a hearing on April 29, 2002, Judge Moroney indicated that he believed Ronald W. Morters and Attorney Sutton were equally culpable in prosecuting these cases. Judge Moroney assessed the sum of $20,000.00 in frivolous claims costs which was apportioned

[1] The negligent handling claim involved the failure to timely sue, demand policy limits, or file a statutory offer to settle.

equally between Mr. Morters and Attorney Sutton. Judgment for his $10,000.00 share of the costs was entered against Mr. Morters on July 29, 2002. (Ex. A)

Ronald W. Morters appealed from the trial court's frivolity determination and assessment of fees on September 11, 2002. In a decision filed on March 25, 2003, the Court of Appeals, District I affirmed the Circuit Court's frivolity determination. (Ex. C) On June 12, 2003, the Wisconsin Supreme Court denied Mr. Morters' Petition for Review of the Court of Appeals' decision. Mr. Morters subsequently petitioned the United States Supreme Court for a writ of certiorari to review the Court of Appeals' decision. In an order entered on November 17, 2003, his petition for certiorari was denied. (Ex. N) Additional relevant facts will be set forth in the Argument.

B. Argument

Sec. 806.07(1)(h) allows relief from a judgment for "any other reasons justifying relief from the operation of the judgment." According to *Conrad v. Conrad,* 92 Wis. 2d 407, 418-419, 284 N.W. 2d 674 (1979) subsection (h) is to be liberally construed to allow relief from judgments whenever appropriate to accomplish justice. Sec. 806.07(2) requires such motions for relief to be made within a reasonable time. A reasonable time to bring a motion under subsection (h) can only be determined after a thorough review of all relevant factors. *Cynthia M. S. v. Michael F. C.,* 181 Wis. 2d 618, 511 N.W. 2d 868 (Ct. App. 1994). Because of events which transpired during the appellate proceedings in this case, the $10,000.00 judgment against Mr. Morters should be set aside in order to accomplish justice. Furthermore, this motion is timely

since it has been bought within a reasonable time following the United States Supreme Court's order which denied certiorari and thus ended Mr. Morters' appellate remedies.

The fact that Barr could not have been responsible for the jury trial deprivation because he was terminated before a new trial date was set and the arbitration occurred was a key element of the trial court's frivolity decision. (Ex. B, p. 4) In its March 25, 2003 decision which affirmed the frivolity determination, the Court of Appeals' reference to this portion of the trial court's decision demonstrates that it also believed the jury trial deprivation claim was frivolous because the Morters still had the right to a jury trial when Barr was discharged. (Ex. C, p. 6 & 7) In its April 30, 2002 decision affirming the granting of partial summary judgment and the directed verdict, the Court also found such fact to be significant. (Ex. D, p. 6 & 7)

Because he was originally led to believe that his jury trial deprivation claim against Barr had a reasonable legal basis under the substantial factor concept of causation followed in Wisconsin, Mr. Morters exhausted his appellate remedies in an attempt to overturn the frivolity finding. However, in light of the denial of certiorari by the United States Supreme Court, Mr. Morters now questions whether his trial counsel properly advised him to pursue litigation against Attorney Barr when the causal nexus between Barr's conduct and the loss was weak. Since he was represented by Aiken & Scoptur when the right to a jury trial was lost, Mr. Morters would have been better advised to proceed with a lawsuit against Aiken & Scoptur. The causal link between Aiken & Scoptur's behavior and the jury trial loss is much stronger than that involving Barr's conduct.

Aiken & Scoptur were eventually sued in Case No. 01-CV-004476 following the granting of the directed verdict in the Barr case. Although Judge Maxine A. White, who presided in such case, granted summary judgment dismissing the case on August 26, 2002,[2] she subsequently found the action to be nonfrivolous.[3] Mr. Morters has appealed from the summary judgment decision in Appeal No. 03-1437 and is defending Aiken & Scoptur's cross-appeal of the frivolity denial. All of the appellate briefs have been submitted, and the case is currently awaiting a decision. The appeal in the Aiken & Scoptur case has been made more difficult due to the possible preclusive effect of the Barr litigation which would not have been present had Aiken & Scoptur been initially sued.[4]

Problems regarding the quality of Mr. Morters' legal representation are exemplified by the events which transpired in the Morters' appeal from the trial court's summary judgment and directed verdict decisions in Appeal No. 01-2011. In its April 30, 2002 decision, the Court of Appeals affirmed the trial court's decision but found the Morters' appeal to be frivolous *solely because of problems with the appellants' brief and violations of the Rules of Appellate Procedure.* (Ex. D, p. 13-15) After the Morters pointed out the difference between frivolity and appellate rules violations in their petition for review prepared by other counsel, the Supreme Court *vacated the appellate frivolity determination* and remanded the matter to the

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[2] (Ex. E)

[3] (Ex. F)

[4] In the Aiken & Scoptur appeal, Mr. Morters has argued that the Barr litigation does not have a preclusive effect on the Aiken & Scoptur lawsuit.

Court of Appeals for reconsideration. (Ex. H) In its January 14, 2003 decision, the Court of Appeals *found the appeal to be nonfrivolous* but imposed sanctions for violation of the Rules of Appellate Procedure. (Ex. G) Pursuant to a recent stipulation between the parties and order of this Court, no costs were assessed for the appellate rules violations. Nevertheless, Mr. Morters was required to 'expend considerable sums to rectify the deficiencies of his former attorney. Additionally, Mr. Morters was further penalized by the expenditure of approximately $12,000.00 to retain an attorney to defend him against frivolity at the trial court level.

Although this Court believed on April 29, 2002 that Ronald W. Morters and his counsel were equally culpable for pursuing the Barr litigation, subsequent events have shown that his attorney should bear the ultimate responsibility for proceeding with this lawsuit. It is the attorney's job to identify problems with the causal nexus between an event and a loss, and it is certainly the attorney's responsibility to comply with the Rules of Appellate Procedure. In the interests of justice, the $10,000.00 judgment against Mr. Morters should be set aside.

In defending against the frivolity allegations at the trial court level, Mr. Morters also believes that two critical facts were not emphasized to the Court. First of all, the opinion of Attorney Patrick Dunphy valued Ronald's case in the $750,000.00 range and the combined damages of Ronald and Ann in excess of $1,000,000.00. (Ex. I) Secondly, while Attorney Terry Johnson who represented the insurer testified that his client would not have paid more

than the $575,000.00 offered at mediation[5], yet three separate settlement offers[6] totaling $597,500.00 were actually made to settle this case. Thus, there was a reasonable basis for asserting that the Morters' claims were worth more than the arbitration award. Additionally, there was no existing Wisconsin case law indicating that an unchallenged arbitration barred a subsequent suit for professional negligence and breach of contract. In their appellate decisions, the Court of Appeals has not identified any legal principles or theory from which such conclusion could clearly be drawn. (Ex. C, Ex. D)

At the fee assessment proceedings in Circuit Court, Mr. Morters had argued that no fees should be assessed because Barr and TIG had failed to mitigate their damages. (Ex. L) If they felt the action was frivolous from the beginning, Morters contended that they had an obligation to provide early notice of the same. (Ex. L) On appeal, Mr. Morters reiterated such argument and urged the Court of Appeals and the Wisconsin Supreme Court to adopt an advanced notice requirement and safe harbor provision similar to Rule 11c of the Federal Rules of Civil Procedure.

Interestingly enough, a review of the November 2003 Edition of the *Wisconsin Lawyer* demonstrates that certain elements within the legal community agree with Mr. Morters' position. On July 8, 2003, the American Board of Trial Advocates, Wisconsin Chapter, the Civil Trial Counsel of Wisconsin, the Wisconsin Academy of Trial Lawyers, and the Litigation Section of the State Bar of Wisconsin filed a joint petition with the Wisconsin Supreme Court

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[5] (Ex. J)

[6] (Ex. K)

seeking repeal of Wisconsin Statutes, Secs. 802.05 and 814.025 and the adoption of Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as an amended Sec. 802.05.[7] The Supreme Court ordered a public hearing on the petition to be held on December 19, 2003 at the State Capitol. A copy of pages 49 through 55 of the *Wisconsin Lawyer* discussing the petition is attached as Exhibit M.

Obviously, significant members of Wisconsin's legal community share the concerns expressed by Mr. Morters about the problems with Sec. 814.025 in its present form. When the Circuit Court assessed fees herein, it noted that the frivolity matter could have and should have been raised earlier. (Ex. O) Hopefully, the requested changes will become law and prevent future litigants from being ambushed in the same manner as Mr. Morters was in this case. While the Court, of course, was bound to apply Sec. 814.025 as it was constituted when the assessment was made herein, the sentiment in the legal community for changing the frivolity law does provide an additional reason for setting aside this judgment in the interests of justice.

C. Conclusion

For the foregoing reasons, the interests of justice require that the $10,000.00 judgment against Mr. Morters should be set aside and nullified. Mr. Morters respectfully requests the Court to set aside and nullify such judgment. In the event that the Court declines to grant such relief, Mr. Morters alternatively requests the Court to stay all

[7] The legal basis for said petition is the Supreme Court's rule making authority under Sec. 751.12.

proceedings to collect on such judgment until the Aiken & Scoptur litigation is concluded. If Mr. Morters is successful in obtaining the reversal of Judge White's summary judgment decision, he believes the $10,000.00 assessment could be recoverable against them as consequential damages.

Dated this 11th day of December, 2003.

Respectfully submitted,

/s/ Ronald W. Morters
Ronald W. Morters
Plaintiff, Pro Se

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APPENDIX J

COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2434

STATE OF WISCONSIN

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. Nos.
99CV5303 & 00CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Deininger, JJ.

¶ 1 PER CURIAM. Ronald W. Morters appeals *pro se* from the order granting the defendants' motion for costs and attorney's fees on the grounds that Morters' claims were frivolous under WIS. STAT. § 814.025(3)(b) (2001-02).[1] Morters also appeals from the judgment awarding $20,000 to the defendants.[2] Morters contends: (1) the trial court erroneously concluded that his claims were frivolous under § 814.025(3)(b); and (2) the trial court erred in its assessment of the costs and fees. We affirm.

I. BACKGROUND.[3]

¶ 2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] A $10,000 judgment was entered against Ronald W. Morters, and a separate $10,000 judgment was entered against his attorney, Robert E. Sutton. Sutton has not appealed his portion of the judgment. Although Morters originally attempted to also appeal his attorney's portion of the judgment, this court dismissed that portion of the appeal on jurisdictional grounds. *Cf. Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 194, 562 N.W.2d 401 (1997) (concluding that a fundamental defect existed when a non-lawyer signed a notice of appeal on behalf of a corporation).

[3] A number of facts involved in this appeal are taken from *Morters v. Barr*, No. 01-2011, unpublished slip op. at ¶1-7 (WI App January 14, 2003), and *Morters v. Barr*, No. 01-2011, unpublished slip op. at ¶2-4 (WI App April 30, 2002).

snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries.

¶ 3 The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict.

¶ 4 The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶ 5 Morters and his granddaughter then started legal malpractice suits against Barr,[4] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; that he was negligent with respect to their worker's compensation claim; that a delay in filing their personal injury case caused them damage; and that he had failed to demand the policy limits or file a statutory offer to settle.[5] During the pendency of these actions, the trial court consolidated the two Morters' lawsuits. Because the plaintiffs had failed to establish any evidence that their conflict-of-interest or jury-trial claims resulted in any discernable monetary damages, the trial court dismissed those claims. With respect to the claims filed with the insurance company, because the evidence revealed that Barr had properly prepared and presented the Morters' claim to the liability insurance company and the insurance company was willing to pay the policy limits, the trial court dismissed this final claim at the close of the plaintiffs' case.

¶ 6 Ronald and Shannon Morters then appealed both the order granting partial summary judgment and the later judgment entered in the defendants' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents filed a motion requesting frivolous

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[4] Ronald's wife, Ann, died before either suit was filed.

[5] Morters subsequently amended his complaint to add Barr's insurer, TIG Insurance Company, as a party-defendant.

costs on appeal. We affirmed the trial court in all respects. Because the Morters' brief on appeal failed to satisfy the requirements of WIS. STAT. RULE 809.19 (1999-2000), we also awarded the respondents costs and fees, including attorney fees, pursuant to WIS. STAT. RULE 809.83 (1999-2000).

¶ 7 In the trial court, the defendants also moved for costs and attorney's fees on the grounds that the Morters' claims against Barr were frivolous under WIS. STAT. § 814.025(3)(b). The trial court ultimately concluded that each of the Morters' claims was frivolous and ordered Ronald Morters and his attorney, Robert E. Sutton, to pay the defendants $20,000.[6]

II. ANALYSIS.

¶ 8 WISCONSIN STAT. § 814.025 provides that reasonable attorney fees shall be awarded to the defendant when a plaintiff commences or continues a claim that is found to be frivolous. Section 814.025(3)(b) provides that a claim is frivolous if "[t]he party or the party's attorney knew, or should have known, that the action . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." "[A] claim cannot be made reasonably or in good faith . . . if there is no set of facts which could satisfy the elements of the claim, or if

[6] Although Ronald's granddaughter was a party to the lawsuit against Barr, the costs and fees were only levied against Ronald and his attorney. Thus, neither Ronald Morters' granddaughter, nor Attorney Sutton, is a party to this appeal.

the party or attorney knows or should know that the needed facts do not exist or cannot be developed." *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994). Furthermore, "[a]n action which initially is not frivolous may become frivolous if the party or his or her attorney learns through discovery or pretrial and trial motions that the action is without any reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." *Kelly v. Clark*, 192 Wis. 2d 633, 655, 531 N.W.2d 455 (Ct. App. 1995).

¶ 9 Thus, "[a] finding of frivolousness under WIS. STAT. § 814.025(3)(b) 'is based on an objective standard, requiring a determination of whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances.'" *Osman v. Phipps*, 2002 WI App 170, ¶ 16, 256 Wis. 2d 589, 649 N.W.2d 701 (citing *Riley v. Lawson*, 210 Wis. 2d 478, 491, 565 N.W.2d 266 (Ct. App. 1997)). The determination of what a reasonable attorney knew or should have known presents a question of fact, and we will uphold the trial court's determination unless it is clearly erroneous. *Id.* Whether these facts support a finding of frivolousness, however, presents a question of law subject to our *de novo* review. *Id.*

¶ 10 In the instant case, in a written decision, the trial court ruled that each of Morters' claims were frivolous:

> Plaintiffs' first claim against Barr is an alleged deprivation of a jury trial. This claim is frivolous for many reasons. Although the original trial date was cancelled, Mr. Barr was terminated in his representation before a new trial

date could be set. In addition, the decision to submit to arbitration prevented any jury trial anyway. The arbitration decision occurred after Mr. Barr's representation was terminated. It is abundantly clear that Mr. Barr could not have been responsible for any perceived deprivation of a jury trial. Accordingly, this claim is frivolous.

Plaintiffs' next claim that Mr. Barr had a conflict of interest in representing all of the plaintiffs. This issue was specifically addressed previously in [a fee hearing] and [the court] found that there was no conflict of interest. This claim had been litigated and lost, and a reasonable attorney should have known that filing this claim against Barr again was frivolous.

Plaintiffs also made a claim against Mr. Barr relating to life insurance and [a] worker's compensation claim. Defendants previously filed a motion for summary judgment on this claim, and plaintiffs never responded. Defendants were granted their motion for summary judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.

Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. *Schlomer v. Perina*, 169 Wis. 2d 247, 253, 45 N.W.2d 399, 402 (1992). . . . [P]laintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.

> Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration value stands as the final value of this case. . . . No matter what dollar amount Mr. Barr [would have] requested, plaintiffs would still only be entitled to what the case is worth – $557,000.
>
> . . . . Plaintiffs should have known that there was no damage, and pursuing its [sic] claim was frivolous.

¶ 11 We agree with the trial court's analysis of Morters' legal malpractice claims. In each instance, Morters failed to allege sufficient facts that could satisfy the elements of the claim. As the trial court adequately established, Morters and his attorney should have known that the needed facts did not exist or could not be developed. Because Morters or his attorney knew or should have known that the positions taken were frivolous, we conclude that the claims were frivolous under WIS. STAT. § 814.025(3)(b).

¶ 12 Morters also contends that the assessment of costs and fees against him was inappropriate. He argues, "[N]o award should have been made or the award should have been nominal. . . ." Morters believes that this position

is consistent with the supreme court's holding in *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 575-79, 597 N.W.2d 744 (1999). We disagree.

¶ 13 The purpose of the frivolous claim and appeal statutes is to deter litigants from commencing or continuing frivolous actions and to punish those who do. *Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997). A court may impose sanctions upon a litigant – even onerous conditions – so long as they assist the court in deterring frivolous claims and are not so burdensome as to deny the litigant meaningful access to the courts. *See id.*

¶ 14 In *Jandrt*, the supreme court stated that "in determining the appropriate amount of fees and expenses, a court should 'reflect upon equitable considerations in determining the amount of the sanction.'" *Jandrt*, 227 Wis. 2d at 577 (citation omitted). Logic dictates that reasonable sanctions make a party whole by including all the costs and fees associated with defending against the frivolous claims. *Id.* The supreme court also stated that "[i]n some circumstances, '[a] duty of mitigation exists, and a [trial] court should ensure that the party requesting fees has not needlessly protracted the litigation.'" *Id.* at 578 (citation omitted).

¶ 15 Based on *Jandrt*, Morters concludes that the costs and fees assessed against him were too severe, because the defendants needlessly protracted the litigation. Unfortunately, Morters argument indicates that he *still* has not learned his lesson regarding the development of a solid argument to support his claims. Morters makes a number of bald assertions, but never adequately demonstrates how the defendants *needlessly* protracted the litigation. Rather, this appeal and the case below validate

the very existence of the frivolous claim and appeal statutes. Unfortunately, Morters remains undeterred from commencing or continuing frivolous actions. Accordingly, the trial court was justified in sanctioning Morters. Because we conclude that the amount of the judgment entered against Morters was reasonable, we affirm.

¶ 16 Based on the foregoing rationale, the trial court is affirmed.

By the Court. – Order and judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX K

COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2011
STATE OF WISCONSIN

NOTICE

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Cir. Ct. Nos.
99CV5303 & 00CV1705

IN
COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

Shannon L. Morters,

Plaintiff-Appellant,

v.

Charles H. Barr and
TIG Insurance Company,

Defendants-Respondents.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions..*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Ronald and Shannon Morters appeal the order granting partial summary judgment, and a later judgment entered in the respondents' favor. The Morters complain that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents have filed a motion requesting frivolous costs on appeal. We affirm all the trial court's rulings. Further, we deem this appeal frivolous. Thus, we remand this matter to the trial court for a determination of frivolous costs on appeal.

I. BACKGROUND.

¶2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most

[1] Judge John A. Franke proceeded over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

serious injuries. The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict. The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶3 Ronald Morters then challenged the motion filed by his first two attorneys requesting that their legal fees be paid out of the settlement. The trial court ruled that the Morters did not have just cause to discharge Barr or the second law firm, and that these attorneys were entitled to their fees out of the arbitration award.

¶4 Morters and his granddaughter then started legal malpractice suits against Barr,[2] claiming that Barr had a

[2] Ronald's wife, Ann, died before either suit was filed.

conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; and that he had failed to demand the policy limits or file a statutory offer to settle. During the pendency of this action, the trial court consolidated the two lawsuits over the objections of the Morters, granted partial summary judgment to the respondents, and granted a motion in limine brought by the respondents. Later, the trial court directed a verdict for the respondents at the close of the Morters case-in-chief.

II. ANALYSIS.

A. *The trial court properly exercised its discretion when consolidating the suits of Ronald and Shannon Morters.*

¶5 The Morters argue that the trial court erroneously exercised its discretion when it consolidated their two separate suits. They contend that the two actions were "distinct" from one another, and their consolidation led to Shannon Morters' lawsuit being "lost in the shuffle." We disagree.

¶6 WISCONSIN STAT. § 805.05 (1999-2000)[3] permits a court to "order all the actions consolidated" if they "might have been brought as a single action." The trial court's decision to consolidate actions is reserved for the sound discretion of the circuit court. *See* ***Fire Ins. Exchange v. Basten***, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996). Thus, we look to see whether the trial court erroneously exercised its discretion.

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[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶7 Here, the trial court's exercise of discretion in consolidating the two separate suits was proper. As noted by the respondents, the two complaints contained numerous identical paragraphs, made the identical claims, and sought the same damages.[4] Moreover, the two legal malpractice cases emanate out of the same facts. As to the allegation that Shannon Morters' suit was "lost in the shuffle," it is apparent from the accident reports attached to the two complaints that Shannon's injuries were minor as compared to Ronald's and, thus, more time may very well have been spent on discovering the extent of Ronald's injuries and whether they were permanent. Moreover, Ronald was employed at the time of the accident and had other insurance claims. However, while these factors may have required more time to be devoted to Ronald's claims, they do not necessarily lead to the conclusion that Shannon's action was "lost in the shuffle." Shannon can point to no damages that occurred because of the consolidation. Consequently, contrary to the assertion made to this court, we conclude: (1) Shannon's case was not "distinct" from that of her grandfather in any important respects; and (2) Shannon was not harmed by the consolidation.

¶8 The trial court's decision to consolidate was based upon the interests of judicial economy and the fact that the respondents would not have to defend against two suits in two different courts. This was a proper exercise of discretion.

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[4] Ronald Morters' complaint stated the damages in specific dollar amounts; Shannon Morters' complaint does not specify a dollar amount.

B. *The award of partial summary judgment was appropriate.*

¶9 The Morters next argue that the trial court erred in granting partial summary judgment to the respondents. Although the Morters' claim in this regard is not entirely clear, the Morters seem to be arguing that the trial court erred in not accepting the opinions of their expert witnesses. In an appeal from the entry of summary judgment, this court reviews the record *de novo,* applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. ***Reel Enters. v. City of LaCrosse***, 146 Wis. 2d 662, 667, 431 N.W.2d 743 (Ct. App. 1988).

¶10 The Morters submit that their expert witnesses "provided . . . opinions concerning the failure of Attorney Barr to properly represent the plaintiffs under the standard of care required of an attorney in such a case." The Morters contend that because of the existence of this testimony, the motion for summary judgment should have been denied in all respects.[5] We disagree.

¶11 The trial court granted summary judgment on the claims that Attorney Barr failed to obtain a jury trial, and that he failed to address the issue of whether he had a conflict of interest in representing all three parties.[6] As the

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[5] Attorney Barr argues that the trial court should have granted his entire summary judgment motion. Because those claims are dealt with in the discussion of the directed verdict order, we decline to address them here.

[6] The trial court also granted summary judgment on Ronald Morters' allegations that Attorney Barr mishandled some of his insurance. No reply was offered to the respondents' motion for summary judgment, and summary judgment was granted on those claims as well.

trial court aptly noted: "It is a question of whether there is any causal connection between the alleged negligen[t] acts – alleged negligen[t] act and any loss by the plaintiffs and I'm satisfied that there is not."

¶12 We agree with the trial court that while there was expert testimony that construed Barr's acts as being negligent, there was no evidence that these alleged negligent acts caused the Morters any damages. Thus, the trial court correctly determined that the Morters still had the right to a jury trial when Barr was discharged, and that there was no showing that the timing of the case caused the Morters any damages.

¶13 With respect to the issue of a possible conflict of interest, the trial court stated: "The only argument that arguably flows out of this conflict issue is somehow this loss of a jury trial right, and once again there's nothing but speculation to link that alleged loss to any damage that the Morters suffered." We agree with the trial court. Even if Attorney Barr's actions could be viewed as negligent in those two respects, the Morters were unable to show how they were damaged.

C. *The trial court properly granted the respondents motion in limine.*

¶14 The Morters next argue that the trial court "improvidently granted parts of the motion in limine." Again, it is difficult to discern from the Morters' brief exactly how the trial court erred in granting the motion in limine.

¶15 The trial court ruled that the Morters' witnesses could not discuss any claims of negligence for matters that

the trial court had already excluded in its summary judgment ruling. The trial court determined that it was inappropriate for one of the Morters' expert witnesses to offer an opinion as to what amount of money a jury would have returned as a verdict in the accident case. The trial court also granted the respondents' motion seeking to exclude any testimony from one of the Morters' experts alleging Barr was negligent for failing to make an earlier demand on the insurance company for settlement. Also granted was dismissal of Morters' contention that Barr was negligent in failing to send Ronald Morters to a psychiatrist or psychologist. However, the trial court only ruled on these two claims after the Morters' attorney informed the court that no such testimony was planned.

¶16 At the motion hearing, considerable time and argument were devoted to the issue of exactly what Morters' expert witness from California was going to testify to concerning the value of the Morters' cases. Ultimately, the trial court prohibited this expert witness from stating that the insurance company would have paid more money if a certain demand process had been utilized by Attorney Barr. Later, the trial court also ruled that this expert was precluded from giving testimony as to the value of the case because what the insurance company would have paid was determined by an expert witness who represented the insurance company in the underlying suit. The insurance company's attorney testified that what the insurance company offered at mediation was the maximum the Morters would have obtained.

¶17 The Morters' brief addressing these matters is just that – very brief. Excluding several long quoted passages from cases, the Morters' argument consists of the following:

> The Circuit Court engaged in a process of denuding the plaintiffs' cases by incrementally excluding the experts testimony. If an expert is qualified he should be allowed to give his opinion not just some of his opinions but all of his opinions that are relevant on the issue in dispute.
>
> The fundamental principles that apply to expert testimony in Wisconsin were announced by Chief Judge Hallows in *Cramer v. Theda Clark Memorial Hospital,* 45 Wis.2d 147, 172 N.W.2d 427 (1969).
>
> . . . .
>
> There is little case law in Wisconsin addressing the procedure followed by the trial court in the cases at bar. It is respectfully submitted that is because such a procedure is virtually unprecedented. The gatekeeper function of a court is simply to determine whether or not an expert is qualified. If so, his opinions should be admitted into evidence. It is clear that in Wisconsin in a legal malpractice case expert testimony is usually required but it is not parsed.
>
> . . . .
>
> The plaintiff's expert witnesses in the case at bar rendered the same kind of opinions that were given in *Helmbrecht* yet the trial court rejected the opinions.

In their reply brief, the Morters amplify their unhappiness with the trial court's ruling and state:

> Again, it is very important to note that the respondents' brief is totally bereft of any discussion of the standards that question the admissibility of expert testimony or a discussion of the

> specific expert testimony rendered in the opinion letters of Attorneys Tessier and Schulz set forth at Appellants' Appendix pages 169-178. The bottom line error in the case at bar is that the experts were not allowed to testify regarding their opinions because of the continuing successful obstruction of the defendants.

Thus, it would appear that the Morters' argument is that their expert witnesses should have been permitted to testify to all their opinions, regardless of whether any foundation for those opinions was present. This is basically a rehash of the Morters' arguments concerning the trial court's summary judgment decision.

¶18 Under WIS. STAT. § 907.02, a person may give an opinion within his or her area of expertise as long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education." An expert's competence may be shown by experience or technical and academic training, so long as the witness knows something beyond that which is generally known in the community. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896, 467 N.W.2d 555 (Ct. App. 1991).

¶19 The trial court's determination to admit or exclude evidence is discretionary and will not be upset on appeal absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Here, the trial court did not prevent the expert witnesses from testifying solely because of their lack of expertise, but rather, the trial court ruled that they could not give certain opinions about Attorney Barr's negligence because the Morters had failed to establish that they were damaged by those acts. Without a showing of any damages, their opinions about Barr's negligence in these areas

were irrelevant to the case. Thus, the trial court's ruling is not clearly erroneous.

D. *The trial court correctly directed a verdict for the respondents.*

¶20 Finally, the Morters argue that the trial court erred when it directed a verdict for the respondents at the close of their case. The Morters' major contention is that the trial court directed the verdict because the trial court "did not comprehend or understand the expert testimony . . . regarding the 'value of the case,'" and that the trial court "viewed the evidence in the light most favorable to the defendants." The record belies their arguments.

¶21 WISCONSIN STAT. § 805.14(1) sets forth the test for granting a motion challenging the sufficiency of the evidence, and WIS. STAT. § 805.14(3) authorizes the bringing of such a motion at the close of the plaintiff's case.

> 805.14 **Motions challenging sufficiency of evidence; motions after verdict.**
>
> (1) TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.
>
> . . . .

> (3) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

Stated differently, the motion to dismiss must be denied unless no jury could disagree on the facts or inferences to be drawn and no credible evidence exists to support a verdict for the plaintiff. *See* ***State v. Joerns Furniture Co.***, 114 Wis. 2d 324, 328, 338 N.W.2d 331 (Ct. App. 1983).

¶22 Here, the trial court gave a detailed and lengthy decision as to why the motion had to be granted. The trial court reiterated the procedural history of the case and its rulings on the various motions. It noted that, as a result of its earlier rulings, the trial was based on a narrow theory of negligence that survived the motions. Essentially, at trial, the Morters contended that had Attorney Barr filed the cases earlier, preserved evidence (such as by taking pictures of the injuries), made a proper demand, contacted the insurance company earlier with his settlement demand, made separate settlement demands for the three parties, and filed a statutory settlement demand, the Morters would have recovered more money. Thus, the trial court outlined the theories of the case as the suit began and as they evolved throughout the jury trial, ultimately determining: "It's overwhelmingly clear to me that a jury, based on this evidence, can only speculate, at best, about what would have happened. . . . But ultimately it's simply speculation as to whether things would have happened

any differently had Mr. Barr not been negligent as was alleged here." We agree.

¶23 No reliable evidence was produced that the insurance company would have paid more money had an offer been made earlier, or paid more if the demand presented to the insurance company had been better packaged. Indeed, the only testimony touching on the insurance company's intentions suggested that the company would not have offered any more money than the original offer regardless of the way the facts were presented; and it must be remembered that the Morters rejected this offer. Further, successor counsel did submit separate offers and the insurance company declined to accept them, so Barr's alleged failure to submit separate offers did not harm the Morters. Finally, the evidence reflects that Barr was not authorized to submit an offer that would have triggered the 12% interest under WIS. STAT. § 807.01(4).[7] The Morters would only accept a higher award, which was never obtained here. Therefore, nothing was presented to the jury that would have permitted the jury to find that Barr's negligence caused the Morters any damage.

¶24 Regarding the Morters' contention that the trial court failed to understand the theory of the "value of the case," they misread the trial court's written decision. As

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[7] WISCONSIN STAT. § 807.01(4) provides:

> (4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04(4) and 815.05(8).

the trial court noted, the "value of the case" evidence discussed the process a *lawyer* would use in valuing the case, not how a *jury* would do so. Also: "The only evidence of an objective value of the case – of what plaintiffs 'should have [] received' – was the arbitrator's award, less the liability discount. This was, of course, the amount they actually did receive." Thus, the trial court properly directed a verdict in favor of the defendants because no credible evidence or inferences from the evidence would have permitted a jury to award damages to the Morters.

E. *Frivolous costs on appeal are appropriate here.*

¶25 The respondents have filed a motion seeking frivolous costs. They contend that the appeal of this matter is frivolous because the briefs filed on behalf of the Morters are totally devoid of a factual presentation, and are most likely deficient under WIS. STAT. § 809.19. The Morters have not replied to this request. We agree that this appeal is frivolous.

¶26 WISCONSIN STAT. § 809.25(3) permits this court to find an appeal frivolous if "the party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal or existing law." Here, the briefs did not entirely comply with the requirements set forth in WIS. STAT. § 809.19(1)-(3).[8] The description of the case is vague

[8] WISCONSIN STAT. § 809.19(1)-(3) provide:

809.19 **Rule (Briefs and appendix).**

(1) BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal. The brief must contain:

(Continued on following page)

(a) A table of contents with page references of the various portions of the brief, including headings of each section of the argument, and a table of cases arranged alphabetically, statutes and other authorities cited with reference to the pages of the brief on which they are cited.

(b) A statement of the issues presented for review and how the trial court decided them.

(c) A statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and, if so, the reasons therefor.

(d) A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.

(e) An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

(f) A short conclusion stating the precise relief sought.

(g) Reference to an individual by first name and last initial rather than by his or her full name when the record is required by law to be confidential.

(h) The signature of the attorney who files the brief; or, if the party who files the brief is not represented by an attorney, the signature of that party.

(i) Reference to the parties by name, rather than by party designation, throughout the argument section.

(2) APPENDIX. The appellant's brief shall include a short appendix providing relevant trial court record entries, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first

(Continued on following page)

and the issues are poorly presented. Often extensive portions of the transcripts needed to be read in order to understand the arguments presented. In some instances, the reader needed to guess at the Morters' arguments. Further, the trial court's ruling, that while negligence was shown no causation or damages were proved, was never addressed. Consequently, we remand this matter to the trial court for a determination of the frivolous costs on appeal.

By the Court. – Judgments and orders affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

APPENDIX L

COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2011
STATE OF WISCONSIN

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. Nos.
99CV5303 & 00CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. This case comes before us on remand from the supreme court. On October 21, 2002, the supreme court issued an order granting the petition for review in the case of ***Morters v. Barr***, 2002 WI App 134, 255 Wis. 2d 833, 646 N.W.2d 855, solely with respect to the issue of frivolousness. The supreme court also vacated our decision with respect to that issue and directed us to reconsider whether the issue was frivolous, and to make specific findings as required by WIS. STAT. RULE 809.25(3)(c) (1999-2000).[2]

¶2 Upon reconsideration, we conclude that the appeal is not frivolous pursuant to WIS. STAT. RULE 809.25(3)(c), because we cannot conclude that the entire appeal is frivolous as required by ***Nichols v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994). However, as our initial alarm was with the complete lack of substance in the appellants' brief, we further conclude that the appellants' brief failed to comply with the requirements of WIS. STAT. RULE 809.19, and accordingly, award the respondents all costs and fees on appeal, including attorney fees, pursuant to WIS. STAT. RULE 809.83(2).

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[1] Judge John A. Franke proceeded over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

I. BACKGROUND.

¶3 Ronald Morters was involved in a multi-car accident when a driver crossed the centerline during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries. The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident.

¶4 Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict. The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶5 Ronald Morters then challenged the motion filed by his first two attorneys requesting that their legal fees be paid out of the settlement. The trial court ruled that the

Morters did not have just cause to discharge Barr or the second law firm, and that these attorneys were entitled to their fees out of the arbitration award.

¶6 Morters and his granddaughter then started legal malpractice suits against Barr,[3] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; and that he had failed to demand the policy limits or file a statutory offer to settle. During the pendency of this action, the trial court consolidated the two lawsuits over the objections of the Morters, granted partial summary judgment to the respondents, and granted a motion in limine brought by the respondents. Later, the trial court directed a verdict for the respondents at the close of the Morters' case-in-chief.

¶7 Ronald and Shannon Morters then appealed both the order granting partial summary judgment and a later judgment entered in the respondents' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents had also filed a motion requesting frivolous costs on appeal. We affirmed the trial court in all respects. We also ruled that the appeal was frivolous, and remanded the matter to the trial court for a determination of frivolous costs on appeal.

¶8 On May 28, 2002, the Morters filed a petition for review with the supreme court. On October 21, 2002, the

[3] Ronald's wife, Ann, died before either suit was filed.

supreme court: (1) granted the petition for review solely with respect to the issue of whether the appeal was frivolous; (2) vacated this court's decision solely as to the issue of frivolousness; and (3) remanded the matter to this court for reconsideration of whether the appeal was frivolous.

II. ANALYSIS.

¶9 An appeal can be found frivolous if the party or the attorney for the party knew or should have known that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2; *see also* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 240-41, 517 N.W.2d 658 (1994). However, to award attorney fees for a frivolous appeal, this court must conclude that the entire appeal is frivolous. ***Nicholas v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994).

¶10 "The question of whether a reasonable attorney and litigant would or should have concluded that a particular claim is without a reasonable basis in law or equity presents a mixed question of law and fact and not a question of fact alone." ***State v. State Farm Fire & Cas. Co.***, 100 Wis. 2d 582, 601, 302 N.W.2d 827 (1981). "When mixed questions of law and fact are presented to this court, there are really two component questions which must be answered. The first question is what, in fact, actually happened; the second question is whether those facts, as a matter of law, have meaning as a particular legal concept." ***Department of Revenue v. Exxon Corp.***, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979).

¶11 The respondents have asked us to award attorney fees for this appeal under WIS. STAT. RULE 809.25(3). While at least two of the appellants' arguments in this appeal may be frivolous, and have been delineated as such by the trial court, we cannot conclude that the entire appeal is frivolous.[4] Because, we have no authority to find individual arguments in a brief frivolous, *see* ***Nichols***, 190 Wis. 2d at 365 n.2, we conclude that the appeal is not frivolous.

¶12 However, this leads us back to our original problem with the Morters' appeal. The appellants' brief contains no specificity of argument other than general assertions of error and long recitations of the law. Therefore, we conclude that the appellants' brief fails to satisfy WIS. STAT. RULE 809.19(1)(e), which requires:

> An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

[4] In a decision and order dated October 18, 2001, the trial court concluded that a number of the Morters' claims were frivolous. We conclude that the "arguments" to this court concerning the trial court's grant of summary judgment and a directed verdict are no more than the rehashing of a number of claims that the trial court has already concluded are frivolous. However, because we cannot conclude that Morters' remaining two claims are without *any* reasonable basis, we have no authority to find the entire appeal frivolous. *See* ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831 (Ct.App. 1994).

¶13 Simply stated, the appellants' brief fails to set forth an "argument." An argument is defined as "a coherent series of reasons, statements, or facts intended to support or establish a point of view." WEBSTER'S THIRD NEW INT'L DICTIONARY 117 (unabr. 1993). In terms of a legal argument, this definition necessarily includes some analysis of the law and the facts of the case as well as an explanation of how the law as applied to those facts yields a certain desired result. In contrast to these requirements, each of the appellants' arguments consists primarily of two pages of block quotation of the law, preceded by one or two vague and directionless sentences concerning the appellants' case. In all, the appellants' argument lasts thirteen pages, but approximately eight of those pages are comprised entirely of cases block-quoted *en masse*.

¶14 We recognize that it is unreasonable to expect every attorney in Wisconsin to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs in order to give some life to the requirements of WIS. STAT. RULE 809.19. The appellants' brief falls short of the mark – the brief was apparently thrown together by making a number of general claims of error and then quoting two pages of law that may or may not be relevant to the case at hand.[5] Thus, we conclude that the brief failed to provide

[5] The appellants' brief is even more troubling in light of the trial court's conclusion that the Morters' negligence claims were frivolous. Despite this ruling and the presumption that "if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal," *see* ***Riley v. Isaacson***, 156 Wis.2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990), in the argument sections concerning summary judgment and directed verdict, the appellants simply reiterate their belief that the trial court was incorrect; they fail to offer a reasoned analysis to overcome this presumption.

"[a]n argument" including "the contention of the appellant [and] the reasons therefor," as required by WIS. STAT. RULE 809.19(1)(e).

¶15 We also pause to note that in filing the brief, the attorney for the appellants certified that he had complied completely with WIS. STAT. § 802.05(1)(a), which provides:[6]

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. . . .
>
> If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion, or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

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[6] Wisconsin Stat. Rule 809.84 provides: "An appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result."

The case law is clear with respect to every argument at issue. Under current law, the relief sought by the appellants is not well-grounded or warranted. Without adequate argument seeking an extension, modification or reversal of existing law, appellate counsel has also failed to satisfy the requirements of § 802.05(1)(a).

¶16 Because the appellants' brief fails to satisfy the requirements of WIS. STAT. RULE 809.19, we award the respondents costs and fees, including attorney fees, pursuant to WIS. STAT. RULE 809.83.[7] Accordingly, we remand this matter to the trial court for a determination of costs and fees on appeal.

By the Court. – Judgment and orders affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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[7] Wisconsin Stat. Rule 809.83(2) holds the sanction for a violation of WIS. STAT. RULE 809.19 and states, in relevant part: "Failure of a person to comply with a court order or with a requirement of these rules . . . is grounds for dismissal of the appeal, summary reversal, striking of a paper, *imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.*" (Emphasis added.)

APPENDIX M

Excerpt from *Wisconsin Lawyer*, November, 2003 Edition Supreme Court Orders.

* * *

Petition

The American Board of Trial Advocates (ABOTA), Wisconsin Chapter,[1] the Civil Trial Counsel of Wisconsin (CTCW),[2] the Wisconsin Academy of Trial Lawyers[3] and the Litigation Section of the State Bar of Wisconsin,[4]

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[1] The Wisconsin Chapter of the American Board of Trial Advocates (ABOTA). ABOTA is a national organization of trial attorneys whose membership is comprised equally of attorneys concentrating in representation of plaintiffs and defendants in civil litigation. ABOTA's national headquarters is located at 16633 Ventura Blvd., Suite 730, Encino, CA 91436; (818) 501-3250. Contact: Ms. Beverly Halpern.

[2] The Civil Trial Counsel of Wisconsin (CTCW) is an organization of more than 500 Wisconsin trial lawyers and professionals dedicated to the defense of individuals and businesses in civil litigation, to the maintenance of an equitable civil justice system, and to the improvement of professional standards in the legal community. CTCWs headquarters is located at 1123 N. Water St., Milwaukee, WI 53202. Contact: Ms. Jane Svinicki, Executive Director.

[3] The Wisconsin Academy of Trial Lawyers (WATL) is a voluntary bar organization of trial lawyers organized for the purpose of securing and protecting the rights of individual persons, and dedicated to the promotion of the fair, prompt, and efficient administration of justice in the state of Wisconsin. WATL's headquarters is located at 44 E. Mifflin St., Madison, WI 53703-2897; (608) 257-5741. Contact: Ms. Jane Garrott, Executive Director.

[4] The Litigation Section is a section of the State Bar of Wisconsin whose 2,050 members include attorneys involved in litigation in Wisconsin's state and federal courts. The section is composed of civil plaintiffs' attorneys and civil defense attorneys. The State Bar headquarters is located at 5302 Eastpark Blvd., Madison, WI 53718-2101. contact Mr. Mike Eckert, Chair of the Litigation Section, or Ms. Debra Sybell, Government Relations Coordinator; (608) 250-6128.

hereby file this Joint Petition requesting that the Supreme Court of Wisconsin, pursuant to its Rule making powers under and pursuant to § 751.12, Wis. Stats., repeal § 802.05, Wis. Stats. and § 814.025, Wis. Stats., and in lieu thereof adopt as new § 802.05, Wis. Stats., the provisions of Rule 11 of the Federal Rules of Civil Procedure, in its entirety, together with the 1993 Federal Advisory Committee Notes to that Rule. Your Petitioners further request that this Petition be set down for a public hearing before the entire Supreme Court at the earliest convenient date, consistent with the letter and spirit of § 751.12. Wis. Stats.

* * *

2. Present Wisconsin rules do not provide a "safe harbor" which would permit a party to withdraw a frivolous pleading, thereby avoiding a sanction. FRCP 11, as amended in 1993, provides for a 21 day "safe harbor" period, which begins with the notification by an opposing party of an intent to file a FRCP 11 motion. Thus, implicit in FRCP 11, as amended in 1993, is the requirement that a party seeking sanctions act promptly when the basis for such a request becomes known. Delayed filing may not only be considered untimely but should lead a court to deny or significantly limit compensatory costs and attorney fees incurred during the delay. As the Federal Advisory Committee noted in 1993, an award of costs/fees "should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claim or defense."

* * *

APPENDIX N

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY
BRANCH 25

RONALD MORTERS, et al.,

Plaintiffs,

-VS-

Case Nos. 00-CV-1705
99-CV-5303

CHARLES H. BARR, et al.,

Defendants.

Proceedings were held on January 8, 2001

MOTION FOR SUMMARY JUDGMENT

JUDGE: JOHN FRANKE
CIRCUIT COURT JUDGE

APPEARANCES:

ROBERT SUTTON, Attorney-at-Law, appeared on behalf of the Plaintiffs.

WILLIAM CROKE, Attorney-at-Law, appeared on behalf of the Defendants.

STEPHANIE L. JACKSON

OFFICIAL COURT REPORTER

* * *

[44] this point I'm going to find that if the expert testimony that is in this record now is admissible, there is ~~im~~[a]material issue of fact for the jury to decide.

One of the claims of negligence is that there was a failure on Barr's part somehow to provide or allow for a jury trial. Let me back up here. First of all, I find it does state a claim. There is no argument about that. I'm satisfied the answer properly joins issue. The question then is whether the moving party submissions state a prima facie case for summary judgment.

As to two of the theories of malpracticing, I'm satisfied that the defendants' submissions do state a prima facie case, and those items are one the failure of Barr to somehow provide for or obtain a jury trial; and the second is the alleged failure to properly address the conflict of interest. This was not a question at this point as to whether there is evidence of malpractice or negligence. It is a question of whether there is any causal connection between the alleged negligence acts – alleged negligence act and [45] any loss by the plaintiffs and I'm satisfied that there is not.

As to any claim resting on the jury trial, the plaintiffs continue – when I say "plaintiffs," I should refer to people. The Morters in the underlying action had that right even after Barr left the case, and there is no showing that there was any damage either in terms of the timing of the jury trial or what would have ultimately happened that resulted in some damage to the plaintiffs.

I don't know that Mr. Tessier can say what a jury would have done, although I guess that's implicit in the embodiment, opinion about the body of the case but that would seem to apply equally to what an arbitrator would do. Ultimately there was a choice here for arbitration and an award made, and there's been simply no showing other

than speculation as to what might have happened had a jury ultimately rendered a decision in this case.

The only causal connection I can see is with respect to the conflict of interest ultimately fails for the same reasons. [46] The only argument that arguably flows out of this conflict issue is somehow this loss of a jury trial right, and once again there's nothing but speculation to link that alleged loss to any damage that the Morters suffered.

I also have to look to plaintiffs' submissions on this, and I find nothing in what they have submitted including the rather vague expert opinions on this issue that constitutes an opinion that the conflict of interest failures of Mr. Barr led to any recognizable loss or damage. It remains purely speculative as to what would have happened and for those reasons, I'm going to grant the motion for summary judgment as to any claim of negligence based on failure to proceed to a jury trial or a failure to properly address the conflict of interest.

What remains are claims of negligence based on the alleged late filing of the case, a failure to make a claim against the insurance company for the maximum under the policy or failure to do that more promptly. The failure to file a settlement demand or perhaps what brings these three together is the [47] general allegation of a failure to properly prepare and present the case to the insurance company.

Now, in order for a jury to find a causal connection between that package of alleged negligence and damage to the Morters, there has to be one ever [sic] two things. There either have to be facts from which a jury could reasonably infer that there was ultimately a worst result or some damage to the Morters because of those failures.

There certainly might be cases where a jury on its own could draw those inferences, but there are not such facts presented in this case.

I'm satisfied that the defendants have made a prima facie showing and the plaintiffs have failed to provide anything suggesting that there's a material issue of fact in terms of what a jury could reasonably infer from these facts and that it would be pure speculation on their part.

That brings me to the other thing that the plaintiff can rely on. It can either rely on facts from which the jury can make its own inferences on expert opinion and

* * *

[54] these lawyers, *Seltrecht* would require dismissal of the claim.

In *Seltrecht,* I believe the damage was the loss of the legal right to bring a suit, and while I haven't had time to review this carefully, there may certainly be the argument that the way Judge Fine phrased the question in the first paragraph of the decision as a reference to an issue that is limited to the situation where the claimed damage is an entire loss of a legal right, and at least in *Seltrecht* that right carried on after the first attorney accused of negligence was off the case and continued to exist and could have been remedied later on.

Whether that factual situation is binding on a situation that we have here, that there is an alleged loss of value in the case is not something I'm addressing today and at this point I'm not clear whether we even have expert testimony that makes that distinction or not. For those reasons, I'm going to deny the motion for summary judgment and find that there is a prima facie case at this

point for an expert opinion. And if in [55] fact the jury hears expert opinion that is in the record now, there would be a material issue of fact as to whether or not some combination of a late filing of the case, a failure to claim the policy limits, or a failure to file a settlement demand did cause some injury to the Morters. For those reasons the motion is denied.

As to those theories of negligence, it is granted as to any theory based on the question of right to a jury trial or the issue of a conflict of interest. Mr. Croke, do you think you can draft up an order –

MR. CROKE: I can, Your Honor. And I understand, Your Honor, those last two issues, the insurance issues, since they weren't replied to that motion is granted as well?

THE COURT: I am granting the motion to dismiss those other claims. As I said, I didn't find them in the amended summons and complaint. Maybe they were in there earlier, but I am granting the motion in those other respects. I've got another case that's been

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APPENDIX O

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY
BRANCH 25

RONALD MORTERS, et al.,

Plaintiffs,

-VS-

Case Nos. 99-CV-5303
00-CV-1705

CHARLES H. BARR, et al.,

Defendants.

Proceedings were held on April 12, 2001

MOTION HEARING

JUDGE: JOHN FRANKE
CIRCUIT COURT JUDGE

APPEARANCES

WILLIAM PATRICK CROKE, Attorney-at-Law, appeared on behalf of the Plaintiffs.

RONALD W. MORTERS, Plaintiff appeared.

ROBERT E. SUTTON, Attorney-at-Law, appeared on behalf of the Defendants.

CHARLES H. BARR, Defendant appeared.

STEPHANIE L. JACKSON

OFFICIAL COURT REPORTER

* * *

[41] $1 million bucks unless somebody asks and in a case like this, they don't pay it out unless there's a formal demand. But that may be a legitimate area for opinion testimony, and I'm not going to speak to it because it doesn't go to the value of the case. It goes to practices of insurance companies in this kind of litigation. So the value of the case issues goes to the first and fourth.

The fourth I can dispose of quickly because no opinions is going to be offered and I will grant the Motion in Limine, as brought by Mr. Croke, and exclude any opinion as to what the insurance company would have done if a certain demand process had been followed by Attorney Barr. Since it's not being offered, it's not worth commenting, but I can't imagine how that would be admissible unless perhaps it came from someone who was an expert on what insurance companies do and at least in this particular area, insurance companies may well differ dramatically, and I could almost take judicial notice of that.

So unless there was a foundation for someone to say that: I worked

* * *

[47] an opinion here that it was worth $1 million or more and that that should have been submitted in the form that Mr. Tessier says it should have been submitted to the insurance company and that there was a chance to depose him about that opinion. So to the extent to which that or any failure to disclose the opinion has any effect here hasn't been specifically raised and has to be a part of the analysis of trial in terms of what actually comes forward from this witness' lips.

I will grant the Motion in Limine in this regard though and that is that I will preclude conclusory opinions from Tessier that he simply agrees with Dunphy's evaluation. If he's going to offer an opinion about value, it needs to be his own opinion based on his own review of the case. If Dunphy's evaluation or anyone else's evaluation does happen to be in evidence, then Tessier can certainly be asked a hypothetical, namely, if a case is worth this much, what should somebody do? But he can't simply put Dunphy's opinion in without any real foundation for Dunphy's opinion what it was based on, what he reviewed, and what

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APPENDIX P

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY
BRANCH 25

RONALD MORTERS, et al.,

Plaintiffs,

-VS-

Case Nos. 99-CV-5303
00-CV-1705

CHARLES BARR, et al.,

Defendants.

Proceedings were held on May 17, 2001

JURY TRIAL – DAY 4

JUDGE: JOHN FRANKE
CIRCUIT COURT JUDGE

APPEARANCES

ROBERT E. SUTTON, Attorney-at-Law, appeared on behalf of the Plaintiffs.

WILLIAM PATRICK CROKE, Attorney-at-Law, appeared on behalf of the Defendants.

STEPHANIE L. JACKSON

OFFICIAL COURT REPORTER

* * *

[96] negligence individually or collectively caused any damage and specifically whether there's evidence that would allow a jury to do more than speculate about this.

The plaintiffs' case in this regard was deficient in my view in many, many different respects, and there are lots of different ways to conceptually approach this. But after the Court's ruling on summary judgment, which excluded certain damage theories and theories of negligence, the case proceeded to trial on a theory of damages based on expert testimony that the plaintiff proffered in support of the proposition that had the case been prepared and presented better and earlier to the insurance company, that the insurance company would have settled the case for $1 million or would have ultimately settled it for some amount that would have been materially more than what was ultimately received.

It's overwhelmingly clear to me that a jury, based on this evidence, can only speculate, at best, about what would have happened. Actually I think there is some [97] evidence, in light of the testimony from Mr. Johnson that was offered by the plaintiffs, that the insurance company would not have settled this case for $1 million or anything close to it, and there's also evidence suggesting that the Morters wouldn't have accepted such an offer if it had been made. But ultimately it's simply speculation as to whether things would have happened any differently had Mr. Barr not been negligent as was alleged here.

The failure to file the case on time is one element of negligence, and there's simply nothing that I can find in the evidence from which a jury could conclude that because you file a case earlier, it would be settled by the insurance company earlier. That's possible, but I don't believe this is something that's within the jurors' knowledge – that they could find that when you have an accident and a date of filing, that somehow when a case ultimately gets resolved is materially affected by the date

of filing. It's certainly possible, but only possible and there's been no evidence that a jury could conclude that the

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APPENDIX Q

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

RONALD W. MORTERS and
SHANNON MORTERS,

Plaintiffs,

vs.

CHARLES H. BARR, et al.,

Defendants.

Consolidated Case Nos.
99-CV-5303
99-CV-1705

DECISION AND ORDER

GRANTING DEFENDANTS' MOTION TO DISMISS AT THE CLOSE OF PLAINTIFFS' EVIDENCE

(Filed Jul. 3, 2001)

At the close of the plaintiff's case, the defendants moved for dismissal on the ground that the evidence was insufficient to establish a causal connection between the alleged negligence of defendant Charles Barr and any injury to the plaintiffs. For reasons set for on the record and further set forth below, I find that a reasonable jury, taking the evidence in the light most favorable to the plaintiffs, could not find that the defendant was responsible for any injury to the plaintiffs, and therefore defendants' motion is granted. The law does not provide a remedy for negligence unless injury can be shown, and plaintiff has failed to establish a compensable injury.

Q2

Background

In separate but consolidated complaints, Ronald Morters and his granddaughter, Shannon Morters, allege that in 1991 they retained attorney Charles Barr to represent them with respect to personal injury claims arising out of a motor vehicle accident, and that Barr was negligent in handling their claims. Ronald Morters' wife was also injured in the accident and was represented by attorney Barr, but she is deceased and is not a plaintiff in this legal malpractice action. Specifically, the complaints alleged that Barr was negligent in that he (1) failed to file the cases sooner; (2) ignored a conflict of interest between Ronald and Shannon; and (3) requested that the trial date be adjourned without their consent. The Ronald Morters claim additionally alleged that Barr was negligent in that he failed to make a demand on the insurance company and file a statutory offer of settlement.

These theories of negligence evolved as the cases progressed, and at trial the plaintiffs focused on Barr's failure to more effectively present a demand for settlement on the insurance company, in particular his failure to better preserve evidence of the injuries, most specifically his failure to videotape Ronald Morters' disabilities and difficulties in period immediately following the accident. However, it is primarily the question of the causal connection between the alleged negligence and an injury to the plaintiffs which has plagued this case from the outset.

Summary Judgement [sic] *Proceedings*

Much of the difficulty in analyzing the issue of cause stems from the failure of the plaintiffs to articulate a coherent and consistent theory of damages. Before I can

determine whether a wrongful act causes damages, both the act and the damages must be identified. At the time defendants' motion for summary judgement [sic] was heard, the plaintiffs failed to establish any evidence to suggest that the date of filing, the adjournment of the jury trial, or the "conflict of interest" resulted in any discernible monetary damage. Consequently, I granted summary judgement [sic] on those theories of negligence.

The only damage theory advanced in opposition to summary judgement [sic] was plaintiffs' claim that *if attorney Barr had properly prepared and presented the Morters' claims to the insurance company, the insurance company would have paid the policy limits.* See *Plaintiff's Brief in Opposition*, filed December 4, 2000, at 8-12; *Motion Hearing Tr.*, January 8, 2001, at 32-33.[1] Since the plaintiffs ultimately fired attorney Barr and proceeded to arbitration with new counsel, the damages were thus the difference between the policy limits of $1,000,000 and the $557,000 plaintiffs were ultimately awarded by arbitration.[2] In light of the arbitrator's award, it was obviously

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[1] No other damages or loss were identified, except for the claim that Barr's negligence cause a delay in the Morters' receipt of their damages for the auto accident. For reasons set forth in *Schloemer v. Perina*, 169 Wis. 2d 247 (1991), such damages are generally *not* compensable, and could be awarded here only if the evidence allowed for a finding that the insurance company would have settled the case earlier. *Id.*, 253-54. Since the plaintiff's proof on this issue ultimately failed, this damage theory also fails.

[2] Only damages were submitted to arbitration, and the total award for all three of the Morters was $557,384. By an agreement not disclosed to the arbitrator, this award was subject to a 10% reduction which apparently reflected the resolution of weak but cognizable defenses based on an "act of God" liability defense; contributory negligence, and the failure of each plaintiff to wear a seat belt.

not going to be easy to prove that a more timely and effective "demand package" would have netted the policy limits, but at the time of summary judgement [sic] the plaintiffs had expert opinion evidence in support [sic] this precise proposition, namely, the opinion of attorney Robert Tessier that if the claim had been more effectively presented to the insurance company the company would have promptly issued its check for $1,000,000. I ruled that *if* the jury was going to hear such an opinion, then jury would be entitled to accept it and find that damages had been established. *Id.*, 51.

However skeptical one might be about such an expert opinion, I determined that the issue of the admissibility of the opinion was not sufficiently before the court at that time.[3] As a result of a subsequent motion in limine, this critical opinion testimony was excluded, but the issue of summary judgment was not revisited in light of that ruling, and the case proceeded to trial.

Trial

In the required pretrial reports, plaintiffs set forth no theory of damages, and the case proceeded to trial based

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[3] The extent to which the court can rule on the admissibility of expert evidence at the summary judgement stage is not entirely clear. I took the position that the court may exclude such evidence where the proponent of the opiion has not established a *prima facie* foundation for its admissibility, but should do so only where the proponent has been given notice that admissibility is at issue and has had the opportunity to present a full foundation for the opinion, that is, where there has been the equivalent of a motion in limine to exclude the opinion. In this case, there had been no clear challenge to the admissibility of the Tessier opinion. *Motion Hearing Tr.*, January 8, 2001, at 48-51.

on the narrow theory of negligence which had survived summary judgment. At trial, the plaintiffs were given considerable latitude in presenting evidence that went beyond that theory, in order to permit the jury to understand the context in which the alleged negligence occurred and to judge the credibility of the witnesses. Inevitably, however, plaintiff's proof fails because, without the stricken expert opinion, there is no basis on which the jury could conclude that the insurance company would have settled the case for the policy limits, even indulging all inferences in favor to the plaintiffs.

Even had the jury been given the full facts of the underlying personal injury case, common knowledge is not sufficient to permit jurors to form their own conclusions about what an insurance company would have done in response to a more effective demand from the plaintiffs. The only evidence on this question was the testimony of Terry Johnson, the attorney who represented the insurance company in the underlying case, that the company would not have paid more than the figure it offered during mediation. Thus, it is speculation for plaintiffs' to even suggest that the insurance company *might* have paid the policy limits, much less contend that they have met their burden to show that the insurance company would actually have done so.

Plaintiffs also contend that Barr was negligent in failing to make separate settlement demands for each of the plaintiffs, but have not shown how such a failure resulted in any damages. This contention is also inconsistent with the claim that Ronald Morters was adamant that the family members not compete against each other for settlement dollars. The insurance company would not have cared how the money was divided, and if separate

demands exceeding the policy limits had caused the insurance company to offer the limits, the separate demands would have reflected *the plaintiffs' assessment of the relative value of their respective claims.*

In opposing the motion to dismiss, plaintiffs seem to have advanced a new damage theory, contending that the damages should be the difference between what they actually got and what they "should have received," and further that the jury could make this calculation because it had evidence of "the value of the case." If this is merely a restatement of the argument that the jury could find that the insurance company would have paid the policy limits, then it fails for reasons discussed above.

If plaintiffs are now suggesting that damages should be measured by trying "a suit within a suit," the argument fails for several reasons. First, such a method is only appropriate where the issues have not be [sic] tried, as in a case where a lawyer misses the statute of limitations, and the plaintiff's loss can only be measured by actually trying the entire underlying case to the jury. *See, e.g., Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271 (1979). In the present case, the issues were resolved, liability by stipulation and damages by arbitration. Moreover, a major part of the plaintiff's theory of negligence was the failure to preserve evidence, essentially videotapes and pictures of the Morters' pain and suffering. Such an alleged defect cannot be corrected by trying the case a second time without such evidence.

In addition, the plaintiffs did not indicate any intention to fully try the underlying auto accident case and did not present the evidence necessary for the jury to make its own decision about the merits of that case. For example,

there was no notice that this jury would be asked to decide issues of liability and plaintiffs offered no medical opinion evidence regarding the cause of or permanent nature of any injuries.

Finally, if plaintiffs are now suggesting that the jury is entitled to determine an abstract pretrial "value" of a personal injury claim, the argument fails because this is not a valid damage theory, particularly not where a case has proceeded to an objective resolution. Even were the courts to recognize such a theory, it would require evidence of an *objective* value of the case rather than evidence of how a plaintiff's lawyer would value a case for settlement purposes.

The jury heard Mr. Tessier testify that a reasonable and prudent plaintiff's lawyer would value the case "at seven figures," but this "value of the case" was specifically presented as a part of the process a plaintiff's lawyer would follow in considering and making settlement demands. Tessier testified as to how a reasonable *plaintiff's lawyer* would value the damages part of the case; he did not testify to an opinions [sic] about how a reasonable jury might value the damages; how such a jury would resolve the plaintiff's liability; or how such a jury would resolve the seat belt defense issues, nor would he have been permitted to testify to any such opinions.[4]

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[4] One might infer that such a determination of the "value of the case" is influenced by an assessment of what a jury would eventually do, but there was no indication of the extent to which this influenced the value. One could equally infer that the plaintiff's lawyer is inclined to value the case for settlement purposes as high as possible, and that his duty to his client obligates him to do so. Assuming that there is

(Continued on following page)

The Tessier opinions were received only for this limited purpose, and the jury was instructed that it could not consider this evidence for the purpose of determining what an insurance company might offer to settle the case. The jury would have been similarly instructed regarding the question of what a jury might award, but I did not understand the defendant to have advanced any such theory of damages. The only evidence of an objective value of the case – of what plaintiffs "should have been received" – was the arbitrator's award, less the liability discount. This was, of course, the amount they actually did receive.

Conclusion

Therefore, it is ordered that defendants' motion to dismiss the plaintiffs case is granted and judgement [sic] shall enter in favor of the defendants and against the plaintiffs.

Dated July 3, 2001.
By the Court:

/s/ John Franke
John Franke
Circuit Judge
Branch 25

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some abstract "value of a case" which can be *objectively* determined before a trial, no such evidence was presented.

APPENDIX R

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

CIVIL DIVISION

RONALD W. MORTERS
Plaintiff,

Case No. 99-CV-005303

v.

CHARLES H. BARR
Defendants.

SHANNON L. MORTERS
Plaintiff,

v. **Case No. 00-CV-001705**

CHARLES H. BARR and TIG INSURANCE COMPANY
Defendants.

DECISION AND ORDER

(Filed Oct. 18, 2001)

STATEMENT OF THE CASE

In separate but consolidated complaints, Ronald Morters and his granddaughter, Shannon Morters, allege that in 1991 they retained attorney Charles Barr to represent them with respect to personal injury claims arising out of a motor vehicle accident, and that Barr was negligent in handling their claims. Ronald Morters' wife was also injured in the accident and was represented by attorney Barr, but she is deceased and is not a plaintiff in this legal malpractice action. Specifically, the complaints alleged that Barr was negligent in failing to file the cases

sooner, he ignored a conflict of interest between Ronald and Shannon, he mishandled certain matters relating to plaintiff's life insurance, and he requested that the trial date be adjourned without their consent. Ronald Morters additionally alleged that Mr. Barr was negligent in that he failed to make a demand on the insurance company and file a statutory offer of settlement.

Because the plaintiff failed to establish any evidence to suggest that the date of filing, the adjournment of the jury trial, the mishandled life insurance, or the "conflict of interest" claims resulted in any discernible monetary damage, the court granted summary judgment on those theories of negligence. The only theory left for trial was that if Mr. Barr had properly prepared and presented the Morters' claims to the liability insurance company, the insurance company would have paid the policy limits. The court later granted defendants' motion to dismiss at the close of plaintiffs' evidence for the failure to establish an injury.

ANALYSIS

Defendants have moved for attorneys fees on the grounds that the plaintiffs' claims were frivolous under § 814.025 of the Wisconsin Code. Plaintiffs respond that defendants' motion is frivolous and move for attorneys fees as well.

A claim is frivolous under § 814.025(3)(b) if the party or party's attorney knew or should have known that the claim was "without any reasonable basis in law or equity." *Stern v. Thompson, Ltd.*, 185 Wis. 2d 220, 240-41, 517 N.W.2d 658, 665 (1994). The standard is whether a party or his attorney knew or should have known that the

position taken was frivolous and in the case of an attorney it is determined by what a reasonable attorney would have known or should have known under the same or similar circumstances. *Id.* The issue is not whether a party can or will prevail but whether the party's position is so indefensible that it is frivolous and that the party should have known it. *Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W.2d 182, 189 (Ct. App. 1984).

A claim cannot be made reasonably or in good faith even though possible in law, if there is no set of facts which can satisfy the elements of the claimor if the party or attorney knows or should know that the needed facts do not exist or cannot be developed. *Stern* 185 Wis. 2d at 245, 517 N.W.2d at 667. If the party or attorney knows or should reasonably know that the facts necessary to meet the required elements of an allegation are not present and cannot be produced, then there is no cause of action. *Id.* When there is a total lack of evidence necessary to prove the claim asserted, this would lead a reasonable party to conclude under the facts of the case that the assertion of such claim would be frivolous. *Id.*

Plaintiffs argue that a motion for frivolous claims cannot be made after a judgment is signed. While it is true that a motion for frivolous claims is not timely if made after the final judgment is signed, it is not true that a ruling cannot be made on a motion for frivolous claims after judgment if the motion is made before the final judgment. If a motion for frivolousness is filed before judgment is entered, a court may, in its discretion, rule on the motion after judgment is entered. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 286, 528 N.W.2d 502, 506 (Ct. App. 1995).

Plaintiffs' first claim against Mr. Barr is an alleged deprivation of a jury trial. This claim is frivolous for many reasons. Although the original trial date was cancelled, Mr. Barr was terminated in his representation before a new trial date could be set. In addition, the decision to submit to arbitration prevented any jury trial anyway. The arbitration decision occurred after Mr. Barr's representation was terminated. It is abundantly clear that Mr. Barr could not have been responsible for any perceived deprivation of a jury trial. Accordingly, this claim is frivolous.

Plaintiffs next claim that Mr. Barr had a conflict of interest in representing all of the plaintiffs. This issue was specifically addressed previously in Judge Kiefer's court in Waukesha County, and Judge Kiefer held that there was no conflict of interest. This claim had previously been litigated and lost, and a reasonable attorney should have known that filing this claim against Mr. Barr again was frivolous.

Plaintiffs also made a claim against Mr. Barr relating to life insurance and worker's compensation claim. Defendants previously filed a motion for summary judgment on this claim, and plaintiffs never responded. Defendants were granted their motion for summary judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.

Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. *Schlomer v. Perina*, 169 Wis. 2d

247, 253, 45 N.W.2d 399, 402 (1992). There was no statute of limitations problem, as Mr. Barr filed the complaint nine months before the statute of limitations was to run. Also, plaintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.

Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration judgment stands as the final value of this case. It makes no difference what amount of monetary compensation Mr. Barr would have asked for since the actual value of the case is $557,000. Even if it were true that Mr. Barr had not asked for the insurance policy limit, there is still no damage to the plaintiffs. No matter what dollar amount Mr. Barr requested, plaintiffs would still only be entitled to what the case is worth – $557,000.

Plaintiffs' claim against Mr. Barr for failing to adequately prepare and present the Morters' claim to the insurance company was lost from the very beginning. Plaintiffs should have known that there was no damage, and pursuing its claim was frivolous.

THEREFORE, it is hereby ordered that Charles H. Barr's and TIG Insurance Company's motion for frivolous claims is granted and Charles H. Barr's and TIG Insurance Company's motion for actual reasonable attorney's fees and costs is granted to be paid by the plaintiffs and/or its attorneys. The defendants should provide a detailed accounting to the Court evidencing such attorneys fees being requested under the five (5) day rule, and an Order for Judgment covering such attorney fees.

Dated at Milwaukee, Wisconsin this 18th of October, 2001.

BY THE COURT:

/s/ Dennis P. Moroney

Honorable Dennis Moroney
Circuit Court Judge
Branch 20
Case No. 99-CV-005303
00-CV-001705

APPENDIX S

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff, CASE NO. 99-CV-005303

-vs-

CHARLES H. BARR, et al.,

Defendants.

SHANNON MORTERS,

Plaintiff, CASE NO. 00-CV-001705

-vs-

CHARLES H. BARR, et al.,

Defendants.

APPORTIONMENT HEARING

April 29, 2002

Proceedings Held Before The
HONORABLE DENNIS P. MORONEY
Circuit Court Judge
Milwaukee County, Branch 20

APPEARANCES:

ALEX FLYNN and GRACE FLYNN, Attorneys at Law, Alex Flynn & Associates, S. C. 1223 N. Prospect Avenue, Milwaukee, Wisconsin, 53202, appeared on behalf of the Plaintiffs Ronald and Shannon Morters.

ROBERT E. SUTTON, Attorney at Law, Robert E. Sutton, S.C., 2631 N. Downer Avenue, Milwaukee, Wisconsin, 53211, appeared on behalf of Robert E. Sutton.

* * *

[65] And then the suggestion that your wife had something to do with this thing and this is the problem, I don't know. It's just a sad, sad day.

And all I can tell you is that I know how frustrated you feel. I can feel you're frustrated. You think you've been tattoed [sic] in this case and not been treated fairly by anybody.

But the bottom line is that the system did treat you fairly but because you didn't hear what you wanted to hear, you sought out someone who would say the things you wanted to hear, and even though you may have relied on those, to a certain extent, there's no question that you – you're as culpable in this case, in my opinion, as Sutton.

And I think Sutton should have told you you don't have a case here because of the basic concepts. Even if he was the most – even if Barr was the worst attorney in the world.

The issue becomes is once you decide to take arbitration and once you sign that agreement to arbitrate, that's your decision, pal, because the law has to give you your own decision-making process no matter what the basis was. Because it was something between you and your wife and she didn't want to go ahead with it, well, those are the [66] breaks. I can't do anything about that. You know, it's sad because I can see all sorts of competing things being pulled on everyone.

Now, I too understand Rule 11 in the federal practice and I also understand 814.025. You know, I would – I wish – I really do wish that it would have been approached earlier in this case that this was a 814.025 issue because it would have been easier to know that this thing was – it was being handled strictly on the merits, that the merits didn't have it. I mean, I agree that the merits weren't there. But, you know, the fact of the matter that Judge Franke didn't decide this was frivolous and went all the way to non-suit before actually getting rid of all the aspects of the case, I'm not smart enough to be on 6th Street, I guess, I'm not a reviewing court, you know, they'll review whatever he did or didn't do in this case, and they'll review perhaps what I did do or don't do in this case, but so be it.

The simple case is that you didn't meet the basic elements and that was clear to me after going through this the first time, and that's the way it is.

So I got to take a look at it from this [67] standpoint.

And I do think that – I do think that the 814 claim could have been made earlier. I do agree with how Rule 11 goes, but Rule 11 is – they don't mess around with that Rule 11 anymore and it's one of those things that's much more firmly implanted, of course, than even 814. We have a lot more latitude under 814, there's no question about that.

But once I made the finding of it being frivolous, and I do think it was, it is and was as to all the claims, the court has to take a look at what is a reasonable amount that is due the insurance company in view of what they had to expend to properly defend a person against these claims

when I felt that it should never have been brought to begin with.

So that being said, I had and I noted that I had erroneously entered an order previously without doing the apportionment. I have corrected that and have laid open that the apportionment issue was going to be settled today and any amounts related to the apportionment would be determined here today.

I do have to look at the impact of this

* * *

[69] So having said all those things and the record having been made, the court is going to assess the sum of twenty thousand dollars which is going to be apportioned with ten thousand dollars payable each by Mr. Morters and by Mr. Sutton.

That amount shall be paid over to Mr. Croke's firm for purposes of the amounts due his client who have paid those moneys to him and his firm under the circumstances of this case and in view of the fact that there should have been notice that it was a frivolous claim, it should have been treated as an 814 right from the beginning. I grant you it was treated as a no merit claim but it still would have given people rise and a time to stop and assess. It was never done.

And even though you're getting these opinions from these people, I don't know why in the world they wouldn't have done the other analysis in the case. I don't know if they were aware of the issue of the arbitration, the confirmation, the lack of confirmation and challenge, I don't know that, but certainly that may very well have been a

very important issue to have been raising with them, at least to me it would have.

And that that shall be due and payable

* * *

APPENDIX T

Excerpt from *Wisconsin Lawyer*, May, 2005 Edition Supreme Court Orders.

Federal Rules of Civil Procedure, Rule 11

In the matter of the repeal of Wis. Stat. § 802.05, and Wis. Stat. § 814.025, and the adoption of Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as amended Wis. Stat. § 802.05.

Order 03-06

On Dec. 19, 2003, the court held a public hearing on the petition filed July 8, 2003, by the American Board of Trial Advocates (ABOTA), Wisconsin Chapter, the Civil Trial Counsel of Wisconsin (CTCW); the Wisconsin Academy of Trial Lawyers (WATL); and the Litigation Section of the State Bar of Wisconsin, seeking repeal of Wis. Stat. § 802.05, and Wis. Stat. § 814.025, and the adoption of the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as amended Wis. Stat. § 802.05.

* * *

The majority of the court now adopts the petition with certain modifications as follows:

Section 1. Effective July 1, 2005 Wis. Stat. § 814.025 is repealed.

Section 2. Effective July 1, 2005, Wis. Stat. § 802.05 is repealed and is recreated to read as follows:

* * *

(3) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

(a) How initiated. 1. 'By motion.' A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim. defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

2. 'On court's initiative.' On its own initiative, the court may enter an order describing the specific conduct that appears to violate sub. (2) and directing an attorney, law firm, or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order.

* * *

IT IS ORDERED that notice of this repeal of § 814.025 and repeal and recreation of § 802.05 be given by a single publication of a copy of this order in the official state

newspaper and in an official publication of the State Bar of Wisconsin.

IT IS FURTHER ORDERED that the 1993 Federal Advisory Committee Notes to Rule 11 of the Federal Rules of Civil Procedure are not adopted but shall be printed for information purposes.

Dated at Madison, Wis., this 31st day of March, 2005.

By the court
Cornelia G. Clark
Clerk of Supreme Court

* * *

¶7 PATIENCE DRAKE ROGGENSACK, J., (*dissenting*). In its Order on Rules Petition 03-06, a majority of the court strikes down Wis. Stat. § 814.025 and Wis. Stat. § 802.05, by "repealing" them. I dissent for two reasons. First, this court does not have the power under either a statute or the constitution to repeal § 814.025, because it is a substantive law that was duly created by acts of the legislature. Second, while this court has the power to revise § 802.05 in certain instances[1] because it began as a supreme court rule, the revisions made by the majority are contrary to the interests of the public. Therefore, I respectfully dissent.

* * *

¶19 For example, adding a procedural safe harbor provision to statutes dealing with frivolous actions would have prevented chilling a plaintiff's right of access to the courts and at the same time protected a defendant's right

[1] *See* Wis. Stat. § 751.12(1).

not be subjected to legal fees incurred defending a lawsuit that should not have continued.[23] The addition of a safe harbor provision would not have violated the mandatory make whole remedy established by the legislature in Wis. Stat. § 814.025 or the remedies for discovery undertaken in a frivolous proceeding that are currently provided in both § 814.025 and Wis. Stat. § 802.05. A procedural safe harbor had the unanimous support of the court.

* * *

[23] *See* John Shapard, et al., Federal Judicial Center, *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure* 4 (1995).

No. 04-1621

OCT 2 1 2005

In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals, District I

PETITION FOR REHEARING

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QUESTION PRESENTED

I. Did the Wisconsin trial court's refusal to address and evaluate Ronald W. Morters' reasons for relief in accordance with established case law standards and the approval of such treatment by the Wisconsin appellate courts violate Mr. Morters' Fourteenth Amendment right to due process of law and demonstrate a lack of respect and due regard for the United States and Wisconsin Constitutions?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Shannon L. Morters was also a plaintiff in the consolidated actions, but she has not participated in the appellate frivolity proceedings and the proceedings seeking relief from the fee assessment judgment because no fee assessment was made against her. The Morters' former attorney, Robert E. Sutton, did not appeal from the fee assessment against him. Because this petition involves a deprivation of Fourteenth Amendment rights by the Wisconsin courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 44.2, the petitioner, Ronald W. Morters, prays that the Court grant a rehearing of the Order denying his Petition for Writ of Certiorari which was entered on October 3, 2005 in Case No. 04-1621.

OPINIONS BELOW

The order of the Wisconsin Supreme Court, dated March 8, 2005, denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to Mr. Morters' Petition for Writ of Certiorari at D1. The decision of the Wisconsin Court of Appeals, District I, dated December 21, 2004, is unpublished and reprinted in the Appendix at A1-8. The Order denying Mr. Morters' Petition for Writ of Certiorari is reported at the U.S. Supreme Court Website at http://www.supremecourtus.gov in the October 3, 2005 Orders List.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on December 21, 2004. A timely Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on March 8, 2005 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. The petition for writ of certiorari was filed within 90 days of the date of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin Supreme Court and the decision of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a). This petition for rehearing was filed within 25 days of the Supreme Court's Order denying the petition for writ of certiorari and is therefore timely under Supreme Court Rule 44.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provision involved in this case is Section 1 of the Fourteenth Amendment of the United States Constitution, which is set forth at App. E1. This case also involves Article I, Secs. 1 and 9, of the Wisconsin Constitution which are reproduced at App. E1-2. The state statutes involved are Wisconsin Statutes, Secs. 806.07(1)(h) and 814.025, which are set forth at App. E2-3.

STATEMENT OF THE CASE

For a complete recitation of the facts of this case, Mr. Morters respectfully directs this Court to the Statement of the Case contained in his Petition for Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE PETITION FOR REHEARING

A. Introduction

According to Supreme Court Rule 44.2, the grounds for the rehearing of an order denying a petition for writ of certiorari shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Both substantial intervening circumstances and other substantial grounds are present in this case. Mr. Morters believes that such considerations warrant a rehearing in this matter.

B. Substantial Intervening Circumstances

Mr. Morters' petition for writ of certiorari was filed on June 1, 2005 and placed on the docket on June 6, 2005. According to the Clerk's docket, the case was considered at the Court's conference on September 26, 2005. Chief Justice William Rehnquist passed away prior to the conference date, and the new Chief Justice, John Roberts,

had not yet been appointed at the time of the conference. When the petition was denied on October 3, 2005, the Clerk's docket indicated that the Chief Justice had not participated in the consideration and decision of this petition.

Because of the timing of the petition and the subsequent temporary vacancy in the office of the Chief Justice, this petition was not considered by the full compliment of the Supreme Court. Since his petition presented a substantial constitutional issue involving the violation of procedural due process rights by the Wisconsin courts, Mr. Morters believes that it is vital for his petition to be considered and decided by the full Court. Given the fact that this case involves the Court's supervisory role over the state courts in evaluating their actions in relation to the United States Constitution, the input of the Chief Justice is particularly important. At his recent confirmation hearing before the United States Senate, Chief Justice Roberts indicated that constitutional law must be addressed more on certiorari and more cases taken.

C. Other Substantial Grounds

In his petition, Mr. Morters asserted that the Milwaukee County Circuit Court had failed to adhere to established case law standards for evaluating his motion for relief from judgment under Wisconsin Statutes, Sec. 806.07(1)(h). (Petition, p. 12-20) Such action effectively deprived him of procedural due process and violated his right to due process as guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution. (Petition, p. 12-20) By failing to rectify this deprivation, Mr. Morters argued that the Wisconsin appellate courts have promoted arbitrariness and unfettered decision making in the evaluation of motions for relief from judgment under Sec. 806.07(1)(h). (Petition, p. 18) Mr. Morters also reminded the Court of the deprivation of appellate due process discussed in his previous petition for

certiorari which was filed in September of 2003 and designated as No. 03-369. (Petition, p. 22) With this latest due process violation, Mr. Morters warned that there was a pattern of indifference to due process in the Wisconsin court system which, if left unchecked, would eventually erode due process in Wisconsin. (Petition, p. 22)

When re-evaluating this case, the Supreme Court should be aware of the events in a related Milwaukee County Circuit Court case involving Mr. Morters which were not previously presented to the Court. Such occurrences further demonstrate the disregard for and erosion of due process in the Wisconsin courts. As noted on page 3 of his petition, the Morters retained the law firm of Aiken & Scoptur, S.C. as their new attorneys after Attorney Barr was discharged. Aiken & Scoptur obtained a new trial date but subsequently stipulated to canceling the trial and having the case resolved by arbitration. (Petition, p. 3) Mr. Morters disputed that he had authorized arbitration, and the Morters subsequently fired Aiken & Scoptur. (Petition, p. 3)

Following the dismissal of the Barr lawsuit in May of 2001, Ronald then sued Aiken & Scoptur for legal malpractice and breach of contract alleging that their behavior deprived him of a jury trial and prevented him from obtaining a greater recovery than received through arbitration. The case was filed in Milwaukee County Circuit Court as No. 01-CV-004476 and assigned to a different branch of the Circuit Court presided over by the Honorable Maxine A. White. Aiken & Scoptur moved for summary judgment, and their motion was granted on August 26, 2002 due to a lack of preparation by Mr. Morters' attorney. In her decision, Judge White recognized the existence of a genuine issue as to whether Ronald had agreed to arbitrate but granted summary judgment based on the absence of causation and damages, public policy, the arbitration award, and the doctrines of issue and claims preclusion.

Like the situation in the Barr litigation[1], Aiken & Scoptur waited until after the decision on the merits to file a motion for a trial court frivolity finding and award of costs and fees pursuant to Wisconsin Statutes, Sec. 814.025. The trial court ultimately denied their motion. Mr. Morters then appealed from the grant of summary judgment, and Aiken & Scoptur cross-appealed from the denial of their frivolity motion.

In its March 16, 2004 decision, the Wisconsin Court of Appeals affirmed the trial court's grant of summary judgment, reversed the decision denying the frivolity motion, and determined that the action was frivolous pursuant to Sec. 814.025(3)(b). The case was remanded to the trial court for a hearing to determine Aiken & Scoptur's reasonable costs and fees. The Court's analysis and findings on the frivolity issue consisted of three conclusory sentences.

Ronald sought review in the Wisconsin Supreme Court, but his petition for review was denied on August 2, 2004. As part of his argument to the Supreme Court, Ronald contended that the Court of Appeals had made insufficient findings to support a frivolity determination in violation of the statutory requirements. Mr. Morters pointed out that it is arbitrary and violative of due process to make a frivolity determination without sufficient findings.

When the case returned to the trial court on remand, it was assigned to the Honorable Richard J. Sankovitz who replaced Judge White due to judicial rotation. On remand, Ronald anticipated that the proceedings would be limited to the assessment and apportionment of trial court costs and fees in accordance with the Court of Appeals' instruction. Much to his surprise, Aiken & Scoptur also requested an award of appellate costs and fees against him despite having filed no motion for an appellate frivolity finding and award with the Court of Appeals as required by

[1] (Petition, p. 5)

Wisconsin Statutes, Sec. 809.25(3)[2]. The Court of Appeals did not discuss appellate frivolity and certainly made no such finding.

Even more astonishing is that the Circuit Court ignored well-settled Wisconsin law and made an appellate frivolity assessment against him in the amount of $17,820.02. Such costs were awarded under the guise of Sec. 814.025 which pertains to frivolity costs and fees *at the trial court level.* Ronald was forced to appeal this decision, and the case designated as No. 2005AP000703 is currently pending before the Wisconsin Court of Appeals awaiting a decision.

This illegal assessment of appellate frivolity costs exemplifies the promotion of arbitrariness and erosion of due process discussed by Ronald in his petition when the lower courts are not required to adhere to established procedures and standards in adjudicating matters. The failure by the Wisconsin appellate courts to rectify arbitrariness promotes an even greater deprivation of due process in the future. After reviewing the following discussion of Wisconsin's appellate frivolity law, the Supreme Court will see just how far the Circuit Court has deviated from constitutional law standards.

The authority for an appellate frivolity award is derived from Sec. 809.25(3)(a) which provides, in relevant part, as follows:

> "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection *shall be filed no later than the filing of the respondent's brief* or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief." [Emphasis added]

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[2] Sec. 809.25(3) governs appellate frivolity motions and awards in Wisconsin.

Sec. 809.25(3)(a)'s statutory mandate clearly requires a timely frivolity motion in the Court of Appeals and a finding by the Court of Appeals before a frivolity award can be made. A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or the Supreme Court if the case has reached that level. The plain language of Sec. 809.25(3)(a) does not permit a trial court to award appellate frivolity fees. Such authority is vested in the Court of Appeals.

Sec. 809.25(3)(c) sets forth the following prerequisite for finding an appeal to be frivolous:

> "In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

Once again, the clear language of the statute requires the Court of Appeals to make the necessary determination. After finding an appeal to be frivolous, the Court of Appeals then remands the case to the trial court with directions to determine the amount of the appellate assessment. See *Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W. 2d 1 (Ct. App. 1998).

An examination of case law confirms that the authority to determine appellate frivolity and order such award has been vested in the Court of Appeals. Citing *J.J. Andrews, Inc. v. Midland*, 164 Wis. 2d 215, 225, 474 N.W. 2d 756 (Ct. App. 1991), the Court in *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 841, 520 N.W. 2d 93 (Ct. App. 1994) noted that "[w]e decide as a matter of law whether an appeal is

frivolous." The Court referred to Sec. 809.25(3)(c)'s requirement that it must find that the appeal was filed in bad faith or was without a reasonable basis. *NBZ*, 185 Wis. 2d at 841.

In *Lucareli v. Vilas County*, 2000 WI App. 157, par. 9, 238 Wis. 2d 84, 89, 616 N.W. 2d 153 (Ct. App. 2000), the Court noted that only an appellate court can find an appeal frivolous under Sec. 809.25(3). The Court in *Sheard v. Sheard*, 129 Wis. 2d 308, 309, 384 N.W. 2d 712 (Ct. App. 1986) held that a claim under Sec. 809.25(3) must be submitted no later than the filing of the respondent's brief. In order to find an appeal frivolous and award appellate fees, the entire appeal must be determined to be frivolous. See *Tennyson v. School Dist.*, 2000 WI App. 21, par. 35, 232 Wis. 2d 267, 290, 606 N.W. 2d 594 (Ct. App. 1999) and *Manor Enterprises v. Vivid, Inc.*, 228 Wis. 2d 382, 403, 596 N.W. 2d 828 (Ct. App. 1999). Furthermore, with respect to Morters' defense of the cross-appeal, the Court in *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 676-677, 457 N.W. 2d 538 (Ct. App. 1990) held that Sec. 809.25(3)'s language does not permit the award of frivolous appeal costs and fees to an appellant. According to *Wisconsin Chiropractic Ass'n v. State of Wisconsin Chiropractic Examining Board*, 2004 WI App. 30, footnote 15, 269 Wis. 2d 837, 676 N.W. 2d 580 (Ct. App. 2004), Sec. 809.25(3) has no application when the party requesting the fees is the appellant.

The Wisconsin Supreme Court's recent decision filed on June 22, 2005 in *Howell v. Denomie*, 2005 WI 81, par. 9, ___ Wis. 2d ___, 698 N.W. 2d 621, 626-627 (2005) reaffirmed that an appellate court decides whether an appeal is frivolous and orders the imposition of appellate frivolity costs. *Howell* permitted the Court of Appeals to raise the appellate frivolity issue on its own motion, but it must give notice that it is considering the issue and give the parties the opportunity to be heard. *Howell*, 2005 WI 81 at par. 19, 698 N.W. 2d at 629.

The language of Sec. 814.025 itself shows that it does not cover appellate frivolity. Sec. 814.025(1) provides as follows:

> "If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, *at any time during the proceedings or upon judgment*, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees." [Emphasis added]

By its very terms, the statute only covers frivolity during the trial court proceedings and upon judgment. It does not cover post judgment frivolity matters.

Case law supports this interpretation. In *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 357, 302 N.W. 2d 508 (Ct. App. 1981), the Court held that *Sec. 814.025 does not permit the assessment of attorney's fees for a frivolous appeal.* The Court in *Peck* noted that Sec. 814.025 does not apply to appeals. *Peck*, 156 Wis. 2d at 675. Sec. 814.025 simply does not give Wisconsin trial courts the authority to make an appellate frivolity determination. Such authority is vested in the appellate courts pursuant to Sec. 809.25(3).

Despite the presentation of ample authority demonstrating that the trial court did not have the authority to make an appellate frivolity award, the Circuit Court ignored the same. Instead, the requirements of a Sec. 809.25(3) motion, an appellate frivolity finding by the Court of Appeals, and Mr. Morters' constitutional rights were considered a "formality." Comments made by Judge Sankovitz at the remand hearing suggest that he did not read the briefs submitted.

Serious due process problems occur when the lower courts are allowed to treat compliance with statutes and case law as mere formalities. By failing to rectify the Circuit Court's disregard of due process in the Barr reconsideration matter, the Wisconsin appellate courts have promoted an even greater deprivation of due process in the Aiken & Scoptur case. Since the Wisconsin appellate courts

have not acted to protect due process rights guaranteed by the United States and Wisconsin Constitutions, the Supreme Court must intervene to compel constitutional compliance in accordance with its supervisory role discussed in *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981).[3] The Court's intervention is particularly vital where the case involves a punitive statute.[4]

CONCLUSION

For the reasons set forth in this Petition, Ronald W. Morters' Petition for Rehearing of the Order denying his Petition for Writ of Certiorari should be granted, and it is respectfully requested that the Court grant this Petition for Rehearing.

Dated this 21st day of October, 2005.

Respectfully submitted,

RONALD W. MORTERS
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SUPREME COURT RULE 44 CERTIFICATE

I hereby certify to this Honorable Court that the reasons for seeking this Petition for Rehearing are limited to intervening circumstances of a substantial or controlling effect and to other substantial grounds not previously presented and that this Petition is being presented in good faith and not for delay.

RONALD W. MORTERS
Petitioner, Pro Se

[3] See discussion on page 21 of Petition for Certiorari.

[4] As noted on page 22 of the Petition for Certiorari, the frivolity statute has a punitive purpose.